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Navigating OSHA Amid the COVID-19 Pandemic

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What You Will Learn:

I. An overview of OSHA's Guidance on Preparing Workplaces for COVID-19;

II. When employees may legally refuse to work under the OSH Act;

III. An overview OSHA's HazCom Standard for training and labeling of cleaning chemicals for authorized use in the workplace;

IV. When COVID-19 constitutes a reportable illness and the time frame you have to report it;

V. An overview of the latest guidance issued by OSHA regarding its interim enforcement plan for investigations;

VI. Q & A

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Which employers are covered by the OSH Act?

- The Act **DOES** cover:
  - Most private sector employers and their employees in the 50 states, the District of Columbia, Puerto Rico, and other U.S. territories.

- The Act does **NOT** cover:
  - Self-employed persons;
  - Farms which employ only immediate members of the farmer's family;
  - Working conditions for which other Federal agencies, operating under the authority of other Federal laws, regulate worker safety (includes most working conditions in mining, nuclear energy and nuclear weapons manufacture, and many aspects of the transportation industries); and
  - Employees of state and local governments, unless they are in one of the states operating an OSHA-approved state plan.

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OSHA®

Occupational Safety and Health Administration

I. OVERVIEW OF OSHA'S GUIDANCE ON PREPARING WORKPLACES FOR COVID-19

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Preparing Workplaces for COVID-19

- OSHA has developed COVID-19 planning guidance based on traditional infection prevention and industrial hygiene practices.
- The guidance focuses on the need for employers to implement engineering, administrative, and work practice controls and personal protective equipment (PPE), as well as considerations for doing so.
- It is intended for planning purposes and employers and workers are instructed to use this guidance to help identify risk levels in workplace settings and to determine any appropriate control measures to implement.

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OSHA's COVID-19
Occupational Risk Pyramid

Occupational Risk Pyramid for COVID-19

Very High	Workplaces considered to have job duties with high risk of exposures to COVID-19 during specific medical, postmortem, or laboratory procedures, such as workers who perform aerosol-generating procedures (e.g., doctors and nurse who perform intubation procedures, some dental procedures, morgue workers who perform autopsies, etc.)
High	Workplaces with high potential for exposure to known or suspected sources of COVID-19, including healthcare delivery and support staff (including doctors and nurses who must enter patient rooms), medical transport workers, and mortuary workers preparing bodies of people suspected of having COVID-19 at death.
Medium	Workplaces with frequent and/or close contact (within 6 feet) with people who may be (but are not known to be) infected with COVID-19. For example, those with frequent contact with travelers returning from international locations, and those who have contact with the general public. (In areas of ongoing community transmission, this may be schools, high volume retail, high-population-density work environments, etc.)
Lower Risk (Caution)	Jobs that do not require contact with people known to be, or suspected of being, infected with SARS-CoV-2, nor frequent close contact with, i.e., within 6 feet of, the general public. Workers in this category have minimal occupational contact with the public and other coworkers.

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Steps Every Employer Can Take to Reduce Workers' Risk of Exposure

1) Develop an Infectious Disease Preparedness and Response Plan

2) Prepare to Implement Basic Infection Prevention Measures

3) Develop Policies and Procedures for Prompt Identification and Isolation of Sick People, if Appropriate

4) Develop, Implement, and Communicate about Workplace Flexibilities and Protections

5) Implement Workplace Controls

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1) Develop an Infectious Disease Preparedness and Response Plan

- Develop a plan that can help guide protective actions against COVID-19.

- Plans should consider and address the level(s) of risk associated with various worksites and jobs performed at those sites, including:

  – Where, how, and to what sources of the infection workers may be exposed

  – Non-occupational risk factors at home and in community settings

  – Workers' individual risk factors (e.g., age; presence of chronic medical conditions, including immunocompromising conditions, pregnancy, etc.)

  – Controls necessary to address these risks

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1) Develop an Infectious Disease Preparedness and Response Plan – CONT.

- Follow local, state, federal, tribal, and/or territorial recommendations regarding contingency plans for situations that may arise due to outbreaks, e.g.:
  - increased absenteeism,
  - social distancing requirements and/or staggered work shifts;
  - interrupted supply chains/deliveries)
- Keep up to date on guidance from local, state, federal, tribal, and/or territorial health agencies and consider how to incorporate guidance into your plan.

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2) Prepare to Implement Basic Infection Prevention Measures

Implement hygiene and infection control practices, such as:

- Promoting frequent hand washing and, if water is not readily available, providing 60% alcohol-based hand cleaners
- Encouraging workers to stay home if sick
- Encouraging respiratory etiquette (covering coughs and sneezes)
- Providing customers and the public with tissues and trash receptacles
- Exploring potential policies and practices to increase physical distance among and between employees and others while state/local health authorities recommend social distancing strategies (e.g., flexible worksites, telecommuting, flexible work hours/staggered shifts)
- Discouraging workers from using others' office space, work tools, and equipment, when possible
- Maintaining regular routine cleaning and disinfecting of surfaces, equipment, and other elements of the work environment

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3) Develop Policies and Procedures for Prompt Identification and Isolation of Sick People

- Encourage employees to self-monitor for signs and symptoms of COVID-19 if possible exposure is suspected
- Develop policies and procedures for employees to report when they are sick or experiencing symptoms of COVID-19
- Consider developing policies and procedures for immediately isolating those who have signs and/or symptoms of COVID-19, and train workers to implement
- Take steps to limit spread of the respiratory secretions of a person who may have COVID-19 (e.g., offer a face mask)
- Consider whether it is possible to isolate people suspected of having COVID-19 separately from those with confirmed cases of the virus to prevent further transmission (particularly relevant in worksites where medical screening, triage, or healthcare activities occur)
- Restrict the number of personnel entering isolation areas
- Protect workers in close contact with (i.e., within 6 feet of) a sick person or who have prolonged/repeated contact with such persons by using additional engineering and administrative controls, safe work practices, and PPE

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4) Develop, Implement, and Communicate about Workplace Flexibilities and Protections

- Actively encourage sick employees to stay home and talk with any companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies
- Ensure that sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies
- Do not require a healthcare provider's note for employees sick with acute respiratory illness to validate illness or return to work, as medical offices and facilities may be extremely busy
- Maintain flexible policies that permit employees to stay home to care for a sick family member
- Provide adequate training, education, and information material to workers and work with insurance companies to provide employees information about medical care

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5) Implement Workplace Controls

In situations where it may not be possible to eliminate the hazard, (e.g. a COVID-19 outbreak), the most effective protection measures are, in order:

1. Engineering Controls,

2. Administrative Controls,

3. Safe Work Practices (type of administrative control), and

4. Personal Protective Equipment (PPE)

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5) Implement Workplace Controls – CONT.

Engineering Controls – Examples:

• Install physical barriers, like clear plastic sneeze guards

• Install high-efficiency air filters

• Increase ventilation in work environments

• Drive-through windows for customer service

• Specialized negative pressure ventilation in certain settings (e.g. for aerosol generating procedures)

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5) Implement Workplace Controls – CONT.

Administrative Controls – Examples:

- Encourage workers to stay at home and minimize contact with workers, clients, customers by utilizing virtual communications and implementing telework
- Offer face masks to ill employees and customers to contain respiratory secretions until they are able to leave
- Alternating shifts to reduce employees in facility at once

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5) Implement Workplace Controls – CONT.

Safe Work Practices – Examples:

- Promote personal hygiene: provide tissues, no-touch trash cans, hand soap, at least 60% alcohol-based hand rubs, disinfectants, and disposable towels for workers to clean work surfaces
- Require regular hand washing or using of alcohol-based hand rubs
- Post handwashing signs in restrooms

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5) Implement Workplace Controls – CONT.

Personal Protective Equipment (PPE)

- Each employer should select the combination of PPE that protects workers specific to their workplace.
- Examples of PPE include: gloves, goggles, face shields, face masks, and respiratory protection, when appropriate.
- PPE should be:
  - Selected based upon hazard to worker
  - Properly fitted and periodically refitted, as necessary (e.g., respirators)
  - Consistently and properly worn when required
  - Regularly inspected, maintained, and replaced, as necessary
  - Properly removed, cleaned, and stored or disposed of, as applicable, to avoid contamination of self, others, or the environment

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Steps to Protect
<u>Medium</u> Exposure Risk Workers

- **Engineering Controls**
  - Physical barriers; sneeze guards
- **Administrative Controls**
  - Provide face masks for ill employees and customers until they can leave.
  - Keep customers informed about symptoms by posting signs where sick customers may visit and minimize their contact with workers.
  - Limit customer/public access to the worksite and consider other strategies, like drive-through service, to minimize face-to-face contact.
  - Communicate availability of medical screening or other worker resources.

- **PPE**
  - Workers with medium exposure risk may need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles.
  - PPE ensembles for workers in the medium exposure risk category will vary by work task, the results of the employer's hazard assessment, and the types of exposures workers have on the job.
  - When PPE will have to be used repeatedly for a long period of time, a more expensive and durable type of PPE may be less expensive overall than disposable PPE.

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Steps to Protect
High to Very High Exposure Risk Workers

- **Engineering Controls**
  - Ensure appropriate air-handling systems are installed and maintained in healthcare facilities.
  - CDC recommends that patients with known or suspected COVID-19 be placed in an airborne infection isolation room (AIIR), if available.
  - Use isolation rooms when available for performing aerosol-generating procedures on patients with known or suspected COVID-19.
  - For postmortem activities, use autopsy suites or other similar isolation facilities when performing aerosol-generating procedures on the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death.
  - Use special precautions associated with Biosafety Level 3 when handling specimens from known or suspected COVID-19 patients

- **Administrative Controls**
  - If working in healthcare facility, follow guidelines and facility standards of practice for identifying and isolating infected individuals and for protecting workers.
  - Develop/implement policies to reduce exposure, such as grouping COVID-19 patients when single rooms not available.
  - Post signs requesting patients and family members to immediately report symptoms of respiratory illness on arrival at healthcare facility and use disposable masks.
  - Consider offering enhanced medical monitoring of workers during COVID-19 outbreaks.
  - Provide workers with job-specific education and training on preventing transmission of COVID-19, including initial and routine/refresher training.
  - Ensure that psychological and behavioral support is available to address employee stress.

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Steps to Protect
High to Very High Exposure Risk Workers

- **Safe Work Practices**
  - Provide emergency responders and other essential personnel who may be exposed while working away from fixed facilities with alcohol-based hand rubs containing at least 60% alcohol for decontamination in the field.

- **Personal Protective Equipment (PPE)**
  - Most workers likely need to wear gloves, gown, face shield or goggles, face mask or respirator, depending on job tasks and exposure risks.
  - Those who work closely (either in contact or within 6 ft) with patients known or suspected of being infected with should wear respirators.
  - Additional PPE may include medical/surgical gowns, fluid-resistant coveralls, aprons, or other disposable or reusable protective clothing. Gowns should be large enough to cover the areas requiring protection.

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Workers Living Abroad
or Travelling Internationally

- Employers should communicate to workers that the U.S. Department of State cannot provide Americans traveling or living abroad with medications or supplies, even in the event of a COVID-19 outbreak.

- As COVID-19 outbreak conditions change, travel into or out of particular countries may not be possible, safe, or medically advisable and it is important that employers and workers plan appropriately.

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OSHA Assistance, Services, and Programs

- Establishing a Safety and Health Program

- Compliance Assistance Specialists

- No-Cost On-Site Safety and Health Consultation Services for Small Business

- Cooperative Programs

- Strategic Partnerships and Alliances

- Voluntary Protection Programs (VPP)

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OSHA Guidance

- This guidance, which contains links intended to provide employer assistance with developing plans, and obtaining educational materials and training, can be found at:

https://www.osha.gov/Publications/OSHA3990.pdf

- Additional guidance may be issued as COVID-19 outbreak conditions change, including as new information about the virus, its transmission, and impacts, becomes available.

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II.   WHEN MAY AN EMPLOYEE LEGALLY REFUSE TO WORK UNDER THE OSH ACT?

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Employee Right to Refuse to Work

Generally, an employee does <u>not</u> have the right to refuse work because of a potentially unsafe condition in the workplace.

However, an employee may refuse work that involves "a risk of death or serious physical harm" <u>IF</u> <u>all</u> of the following are true:

1. Employee has asked employer to eliminate a hazard in the workplace but employer has failed or refused to do so;
2. **Employee has a "good faith" belief that an <u>imminent danger</u> (as defined by the OSH Act) exists**;
3. A "reasonable" person would agree there is a "real danger" of death or serious injury; AND
4. There is no time to correct the hazard through an appropriate channel, (e.g. an OSHA inspection).

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"Imminent Danger" Defined

Section 13(a) of the OSH Act defines <u>imminent danger</u> as:

"... *any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.*"

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Conditions Required to Qualify Hazard as "Imminent Danger"

- Threat of **death** or **serious physical harm** (that a part of the body is damaged so severely that it cannot be used or cannot be used very well);

- A reasonable expectation that toxic substances or other health hazards are **present and exposure to them will shorten life or cause substantial reduction** in physical or mental efficiency (not necessarily immediate harm);

- **Threat must be immediate or imminent** (employee must believe that death or serious physical harm could occur within a short time; e.g. before OSHA could investigate);

- If an OSHA inspector believes that an imminent danger exists, the inspector must inform employees and the employer that inspector is recommending that OSHA take steps to stop the imminent danger.

- OSHA has the right to ask a federal court to order the employer to eliminate the imminent danger.

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Fear vs. Legitimate Refusal

- While a generalized fear of contracting COVID-19 is not likely to justify a work refusal in most cases, employers should conduct an investigation of the facts before taking disciplinary action against the refusing employee.

  - For example, consider the following:

    - Is the employee being advised by their healthcare provider to self-quarantine?

    - Might the employee need an accommodation under the ADA?

    - Does the employer have any leave obligations to the employer under the FMLA? The FFCRA?

    - Can the employee continue to work from home?

    - Can the employer accommodate, within reason, an employee's request for additional time off from work?

- Note that, even if the employee's refusal to work is justified, the _OSH Act_ does not require that the employee be paid for time they are not at work due their refusal (BUT, be mindful of paid leave requirements under the FFCRA if the leave is a qualifying leave).

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Be Mindful of the NLRA

"Concerted Activity" under Section 7 of the National Labor Relations Act

- The NLRA provides broad statutory protection to employees (both union and non-union) to engage in "protected concerted activity for mutual aid or protection."

- Concerted activity has been defined to include circumstances where two or more employees act together to improve their employment terms and conditions, and has also been extended to individual action expressly undertaken *on behalf of* co-workers.

  – The NLRB includes "talking with one or more employees about working conditions," "participating in a concerted refusal to work in unsafe conditions," and "joining with co-workers to talk to the media about problems in your workplace" as examples.

- Employees are generally protected against discipline or discharge for engaging in such concerted activity.

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III. OSHA'S HAZCOM STANDARD FOR TRAINING AND LABELING OF CLEANING CHEMICALS FOR AUTHORIZED USE IN THE WORKPLACE

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OSHA's Hazard Communication (HazCom) Standard

- OSHA's HazCom Standard requires that information about the identities and hazards of chemicals used in the workplace be available and understandable to workers.

- As such, employers utilizing non-exempt chemicals are required to maintain and/or provide employee access to:
  - Safety Data Sheets (SDSs),
  - a written HazCom plan,
  - a chemical inventory list,
  - workplace labeling system, and
  - HazCom training.

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OSHA's Hazard Communication (HazCom) Standard

Commercially sold cleaning products sold have generally been exempt from regulation under the HazCom Standard:

- Section 1910.1200(b)(6)(ix) **exempts** consumer products and hazardous substances, (as defined in the Consumer Product Safety Act and Federal Hazardous Substances Act) if the use of such products in the workplace **"results in a duration and frequency of exposure which is not greater than the range of exposures that could reasonably be experienced by consumers."**

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HazCom Standard In Light of COVID-19

Frequency and volumes of chemical usage of consumer products in light of COVID-19 could <u>negate</u> the exemption.

Err on the side of caution.

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Key Takeaway for Cleaning Chemicals and Disinfectants in the Workplace

- If using chemicals other than household cleaners <u>OR</u> using household cleaners but with greater frequency and volume than an employee would use at home, employers must:
  - ensure that your workforce is trained on the hazards of the products being used (including incompatible chemicals to avoid);
  - maintain a written program pursuant to OSHA's Hazard Communication standard (29 CFR 1910.1200), including an updated list of workplace chemicals;
  - download copies of the manufacturer's SDSs for the applicable chemicals; and
  - consider need to prepare a compliant workspace or secondary labels, as needed.

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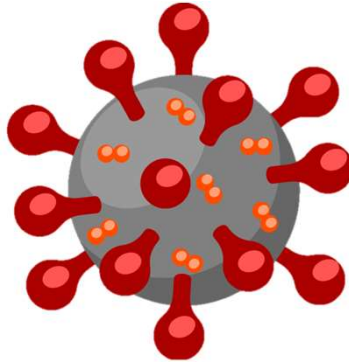
IV. COVID-19 AS A REPORTABLE ILLNESS AND TIME REQUIRED FOR REPORTING

When Does OSHA Require Employers to Document Cases of COVID-19?

Employers must document COVID-19 cases when they are **"confirmed"** and **"work-related"** . . .

- – **"confirmed"** (as defined by the CDC) when the infected employee has had at least one respiratory specimen that tested positive for SARS-CoV-2, the virus that causes COVID-19

- – **"work-related"** if the employee is infected by the virus at work

<u>AND</u> . . .

When Does OSHA Require Employers to Document Cases of COVID-19?

Employers must document COVID-19 cases when they are **"confirmed"** and **"work-related"**, **AND** involve one or more of the following:

- death,
- days away from work,
- restricted work or transfer to another job,
- medical treatment beyond first aid,
- loss of consciousness, or
- a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.

The illness is **not recordable if** worker was exposed to the virus while off the clock.

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How can employers determine whether a case is "work-related"?

- **OSHA has instructed that employers are to consider the case work-related if they have reasonably available, objective evidence that the infection was work-related.**

- Note, however, that this instruction does not apply to employers in the healthcare industry, emergency response organizations (e.g., emergency medical, firefighting, law enforcement services), and correctional institutions in areas where there is ongoing community transmission, as these employers must continue to make work-relatedness determinations as usual, pursuant to 29 CFR § 1904.

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What constitutes "reasonably available," "objective evidence"?

OSHA-Provided Examples

- Example of **<u>objective evidence</u>**:

a number of cases developing among workers who work closely together without an alternative explanation.

- Example of **<u>reasonably available</u>** objective evidence:

evidence that is learned through information given to the employer by employees or information that an employer learns regarding its employees' health and safety in the ordinary course of managing its business and employees.

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OSHA Form 300 Coding

- COVID-19 is a *respiratory illness* and should be coded as such on the <u>OSHA Form 300</u>.

  – Under this designation, if an employee voluntarily requests that his or her name not be entered on the log, the employer must comply.

- Failure to follow OSHA record-keeping requirements can expose an employer to substantial fines and penalties under the OSH Act.

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Notification to OSHA of Reportable Event

- The clock starts for an employer to notify OSHA of a reportable event (including COVID-19) once the employer is made aware

- Where employer is not immediately aware of a reportable event that was the result of a work-related incident, a report to OSHA must be made as follows from the date that the employer (or its agent(s)) becomes aware that the event was the result of a work-related incident:

  – eight (8) hours for a fatality; and

  – twenty-four (24) hours for an inpatient hospitalization, an amputation, or a loss of an eye.

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V.   LATEST OSHA GUIDANCE REGARDING INTERIM ENFORCEMENT PLAN FOR INVESTIGATIONS

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April 2020 Enforcement Memorandums

OSHA's April 13 Interim Enforcement Response Plan for Coronavirus Disease:

- modifies how OSHA Compliance Safety and Health Officers (CSHOs) address complaints; and

- modifies what is expected of employers during an investigation relating to the virus causing the COVID-19 pandemic.

OSHA's April 18 Good Faith Enforcement Memorandum:

- gives OSHA Regional Administrators and State Plan Designees discretion in enforcing violations based on an employer's good faith efforts.

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Key Modifications Set Forth in
April 13 Interim Enforcement Response Plan

<u>Complaints</u>

- Complaints from employees at worksites that are determined to pose **medium to low risk** of exposure to COVID-19 will generally be processed as "non-formal phone/fax" following the non-formal complaint and referral procedures in its Field Operations Manual

- **UNLESS** an employer fails to provide an adequate response to OSHA's phone/fax investigation

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Key Modifications Set Forth in
April 13 Interim Enforcement Response Plan

Complaints

- Facilities identified as having **high and very high risk** exposure jobs will typically be the focus of any inspection activities in response to COVID-19-related complaints/referrals and employer-reported illnesses

- Standard OSHA inspection procedures will be followed; these inspections may include on-site "walk arounds", record/document reviews, and employee interviews.

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Other Modifications Set Forth in
April 13 Interim Enforcement Response Plan

- OSHA must initially notify the employer of the alleged hazard by phone (not by fax, email, or letter, as previously permitted);

- Fatalities and imminent danger exposures related to COVID-19 will be prioritized for inspections, giving particular attention to healthcare organizations and first responders;

- Employer-reported hospitalizations will be handled using the RRI in most cases;

- In all phone/fax correspondences, OSHA Area Offices will assist employers by directing them to publicly available guidance documents on protective measures;

- Area Offices will document the status and condition of the work operations to the extent possible, including information indicative of the likelihood of exposure;

- Workers requesting inspections, complaining of COVID-19 exposure, or reporting illnesses will be informed of potential coverage under one or more whistleblower statutes.

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Employer's Good Faith Efforts

- OSHA's latest April 18 Enforcement Memorandum gives investigators latitude to take into "strong consideration" employer's adequately demonstrated good faith effort to comply with safety standards (annual or recurring audits, reviews, training, or assessments) in enforcing violations

- Investigators advised to examine whether employer thoroughly explored all compliance options, (e.g. use of virtual training or remote communications where possible, rescheduling of required annual activity, etc.)

- Where employer cannot comply with OSHA-mandated training, audit, inspection, assessment, or testing due to site closure, investigators will look to whether employers demonstrate a good faith attempt to meet any of the applicable requirements following the re-opening of the worksite.

- Where employer cannot demonstrate any efforts to comply, a citation may be issued as appropriate under the existing enforcement policy

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VI. QUESTIONS.

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Thank you!

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