

# COVID-19 and Workplace Safety

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# OSHA COVID-19 Enforcement and Rulemaking



# Pre-Inauguration COVID-19 Enforcement Trends ....

- OSHA conducting numerous inspections, some in-person and some virtual.
- Citations are being issued largely for recordkeeping violations and violations of OSHA's respiratory protection standard.
- OSHA has issued General Duty Clause citations in a few instances.
- OSHA aggressively publicizing enforcement activity, including listing employers cited for COVID-19 concerns.



# OSHA COVID-19 National Emphasis Program

- “This Direction describes policies and procedures for implementing a National Emphasis Program (NEP) to ensure that employees in high-hazard industries are protected from the hazard of contracting SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2), the cause of COVID-19. The NEP augments OSHA’s efforts addressing unprogrammed, COVID-19-related activities, e.g., complaints, referrals, and severe incident reports, by adding a component targeting specific high-hazard industries or activities where this hazard is prevalent. The NEP targets establishments that have workers with increased potential exposure to this hazard.”



# OSHA COVID-19 National Emphasis Program (cont'd)

- Describes a federal program change that establishes an NEP to identify and reduce or eliminate exposures to SARS-CoV-2 (the virus), the cause of COVID-19, through inspection targeting, outreach, and compliance assistance.
- Based on the individual variability of COVID-19 protective requirements currently in place across all State Plans, OSHA strongly encourages State Plans to adopt this NEP, but does not require identical adoption.
- State Plan notice of intent regarding the NEP is required.



# OSHA COVID-19 National Emphasis Program (cont'd)

- Goal of NEP is to significantly reduce or eliminate worker exposures to SARSCoV-2 by targeting industries and worksites where employees may have a high frequency of close contact exposures and therefore, controlling the health hazards associated with such exposures.
- In each Region, the goal is to continue performing a high percentage of COVID-19 inspections (at least 5 percent) of the Region's total assigned inspection goal (which is approximately 1,600 inspections OSHA-wide), focusing Agency resources on workplace exposures to SARS-CoV-2 in certain critical industries until further notice.

# OSHA COVID-19 National Emphasis Program (cont'd)

- Targeted Industries in Healthcare by 2017 NAICS:
- Offices of Physicians (except Mental Health Specialists);
- Offices of Dentists
- Home Health Care Services
- Ambulance Services
- General Medical and Surgical Hospitals
- Psychiatric and Substance Abuse Hospitals
- Specialty (except Psychiatric and Substance Abuse) Hospitals
- Nursing Care Facilities (Skilled Nursing Facilities)
- Residential Intellectual and Developmental Disability Facilities
- Continuing Care Retirement Communities
- Assisted Living Facilities for the Elderly



# OSHA COVID-19 National Emphasis Program (cont'd)

- Targeted Industries for non-Healthcare by 2017 NAICS:
- Meat Processed from Carcasses Animal (except Poultry) Slaughtering
- Poultry Processing
- Supermarkets and Other Grocery (except Convenience) Stores
- Discount Department Stores
- General Warehousing and Storage
- Temporary Help Services
- Full-Service Restaurants
- Limited-Service Restaurants
- Correctional Institutions



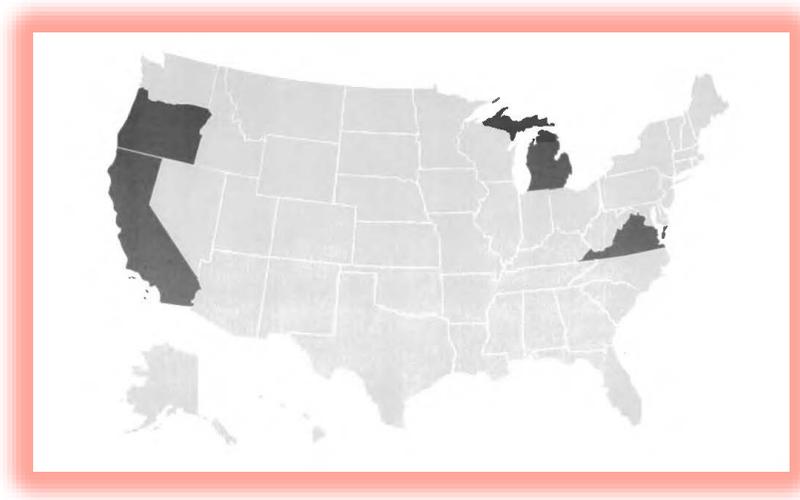
# OSHA COVID-19 National Emphasis Program (cont'd)

- Supplemental Industries for non-Healthcare in Essential Critical Infrastructure
  - Construction of Buildings
  - Heavy and Civil Engineering Construction
  - Specialty Trade Contractors



# State Activity

- Comprehensive standards in many states enacted or under development, including Virginia, Michigan, Oregon, and California.
- Many other states giving state enforcement agencies “authority” to enforce government mandates under General Duty Clause.



# Emergency Temporary Standard?

The OSH Act:

The Secretary shall provide, without regard to the requirements of chapter 5, title 5, United States Code, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines --

- (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and
- (B) that such emergency standard is necessary to protect employees from such danger.

Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with section 6 (b) of this Act, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

# Judicial Review

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.



# AFL-CIO Petition in D.C. Circuit Court of Appeals

- AFL-CIO sought Writ of Mandamus in D.C. Circuit Court of Appeals to force OSHA to issue an ETS covering “all” employees.
- DOL denied an earlier petition and opposed the Writ.
- In addition, several groups filed as amicus curiae in support of DOL, including ABC.
- On June 11, 2020, court denied the AFL-CIO petition, holding that:
  - Issuing a Writ of Mandamus would be an extraordinary remedy.
  - OSHA has been authorized by Congress to make the determination as to whether to issue a standard, weighing all relevant evidence.
  - The COVID-19 pandemic is constantly evolving and it is reasonable for OSHA to rely on existing tools to address the issues.

# Infectious Disease Standard

**DOL/OSHA**

**RIN: 1218-AC46**

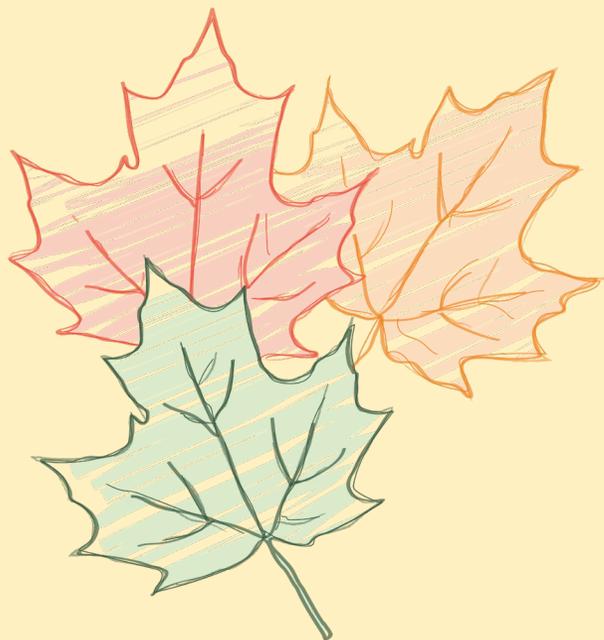
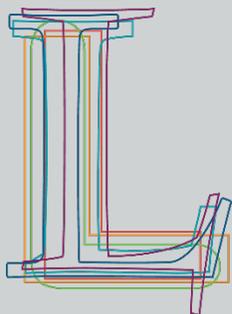
**Publication ID: Spring 2016**

**Title:** Infectious Diseases

**Abstract:** Employees in health care and other high-risk environments face long-standing infectious disease hazards such as tuberculosis (TB), varicella disease (chickenpox, shingles), and measles (rubeola), as well as new and emerging infectious disease threats, such as Severe Acute Respiratory Syndrome (SARS) and pandemic influenza. Health care workers and workers in related occupations, or who are exposed in other high-risk environments, are at increased risk of contracting TB, SARS, Methicillin-resistant Staphylococcus aureus (MRSA), and other infectious diseases that can be transmitted through a variety of exposure routes. OSHA is concerned about the ability of employees to continue to provide health care and other critical services without unreasonably jeopardizing their health. OSHA is developing a standard to ensure that employers establish a comprehensive infection control program and control measures to protect employees from infectious disease exposures to pathogens that can cause significant disease. Workplaces where such control measures might be necessary include: health care, emergency response, correctional facilities, homeless shelters, drug treatment programs, and other occupational settings where employees can be at increased risk of exposure to potentially infectious people. A standard could also apply to laboratories, which handle materials that may be a source of pathogens, and to pathologists, coroners' offices, medical examiners, and mortuaries. (Spring 2016 Regulatory Agenda)

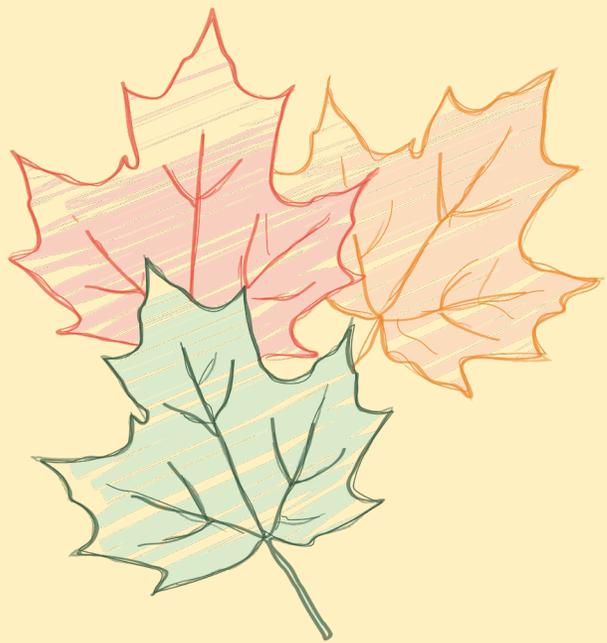
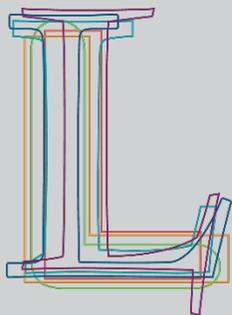
# OSHA ETS .... Possibilities

- Follow airborne transmissible disease standard.
- Require employers to conduct a hazard assessment, develop a written exposure control plan.
- Implement engineering and work practice controls as feasible.
- Review ventilation systems.
- Mandatory face coverings.
- Maintenance of pay and benefits when COVID-19 positive or quarantining.
- Education on vaccine use.



# Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



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