MARCH 15, 2021 | NATIONAL, REGIONAL & LOCAL EMPHASIS PROGRAMS (LEPS)

OSHA Announces COVID-19 National Emphasis Program and Updated Interim Enforcement Response Plan

By Conn Maciel Carey's COVID-19 Task Force

While OSHA is expected today, March 15th, to confirm that it will issue a COVID-19 Emergency Temporary Standard (ETS), and to get that ETS released within a month, there were also a couple of important developments last week regarding OSHA's approach to COVID-19 enforcement.

On Friday afternoon, March 12th, OSHA launched a COVID-19 National Emphasis Program ("COVID-19 NEP") to:


OSHA DIRECTION

U.S. DEPARTMENT OF LABOR — Occupational Safety and Health Administration

DIRECTIVE NUMBER: CPL 03-00-XXX (CPL 03) | EFFECTIVE DATE: March 12, 2021

SUBJECT: National Emphasis Program – Coronavirus Disease 2019 (COVID-19)

ABSTRACT

Purpose: This Direction describes policies and procedures for implementing a National Emphasis Program (NEP) to ensure that employers in high-hazard industries or work tasks are protected from the hazard of contracting SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2), the cause of Coronavirus Disease 2019 (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 to target 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, and that puts the largest number of workers at serious risk. In addition, this NEP includes an added focus to ensure that workers are protected from retaliation, and are accomplishing this by preventing retaliation where possible, distributing anti-retaliation information during inspections, and outreach opportunities, as well as promptly referring allegations of retaliation to the Whistleblower Protection Program.

Scope: This Direction applies OSHA-wide.

References: Presidential Executive Order on Protecting Worker Health and Safety, January 21, 2021.

Section 5(a)(1) of the Occupational Safety and Health Act (OSH Act), 29 U.S.C. § 654.

OSHA Instruction, CPL 02-00-164, *Field Operations Manual (FOM)*, April 14, 2020.

OSHA Instruction, CPL 02-03-007, *Whistleblower Investigations Manual*, January 28, 2016.

OSHA Guidance, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, January 29, 2021.

"focus its inspection and enforcement efforts on companies that put the largest number of workers at serious risk of contracting the virus,"* as well as prioritizing employers that *"retaliate against workers for complaints about unsafe or unhealthy conditions, or for exercising other rights protected by federal law."

This move by OSHA was not unexpected. As we previously shared, Pres. Biden's Day-1 OSHA Executive Order on Protecting Worker Health and Safety (the same EO that called for the COVID-19 ETS), separately called for OSHA to issue a COVID-19 NEP.

Goals of the COVID-19 NEP

In today's announcement about the COVID-19 NEP, OSHA explained that *"the goal of this NEP is to significantly reduce or eliminate worker exposures to SARS-CoV-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."* The NEP includes ***"an added focus to ensure that workers are protected from retaliation"*** and are accomplishing this by preventing retaliation where possible, distributing anti-retaliation information during inspections and outreach opportunities, as well as promptly referring allegations of retaliation to the Whistleblower Protection Program.

Industries and Workplaces Covered by the NEP

OSHA also explained that inspections under the COVID-19 NEP will include some **follow-up inspections of worksites previously inspected** by OSHA in 2020, but principally will **focus on establishments in industries identified on targeting lists** OSHA will develop now. The NEP covers a broader set of workplaces than seems consistent with the goals of the NEP. The directive creates ***three different lists of covered workplaces*** – high risk healthcare establishments and high risk non-healthcare establishments (which is how the NEP has been described), and also a third list of "Supplemental Industries for non-Healthcare in Essential Critical Infrastructure" that does not have the same high exposure risk characteristics of the first two lists. The industries covered by these three lists are included at the bottom of this email. Area Offices may also *"add establishments to the generated master lists based on information from appropriate sources (e.g., local knowledge of establishments, commercial directories, referrals from the local health department, or from other federal agencies with joint jurisdictions, such as the Centers for Medicare & Medicaid Services (CMS) and the U.S. Department of Agriculture (USDA), media referrals or previous OSHA inspection history)."*

The directive for the NEP explains that OSHA's goal is to continue performing a "***high percentage of COVID-19 inspections (at least 5%) 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.***" Unprogrammed COVID-19-related inspections will continue to be conducted at worksites where employees have a high frequency of close contact exposures. OSHA anticipates that the majority of the inspections will continue to occur in ***general industry, particularly in healthcare,*** based on current OSHA enforcement data showing higher COVID-19-related complaints, referrals and severe incident reports at healthcare worksites.

One important issue under the NEP that employers should note is that inspections initiated under this NEP at

sites that also happen to be ***on OSHA's Site-Specific Targeting ("SST") list, will see a combined inspection*** – the COVID-19 inspection and the wall-to-wall inspection covered by the SST Program. Also note that there is ***no "small business" exception*** – establishments with fewer than 10 workers are still subject to inspection under this NEP. Like many other NEPs, Fed OSHA is strongly **encouraging all of the State OSH Plans to adopt the COVID-19 NEP** or a similar enforcement emphasis program. The State Plans are required to notify Fed OSHA of their intentions whether to adopt the NEP within 60 days after its issuance.

Effective Date and Duration of the NEP

OSHA explained that the COVID-19 NEP is ***effective immediately*** (as of today, March 12, 2021), despite the 90-day outreach period that typically precedes inspections under a new NEP, to allow OSHA time to inform the regulated community about the scope and substance of the new program. The agency reasoned that:

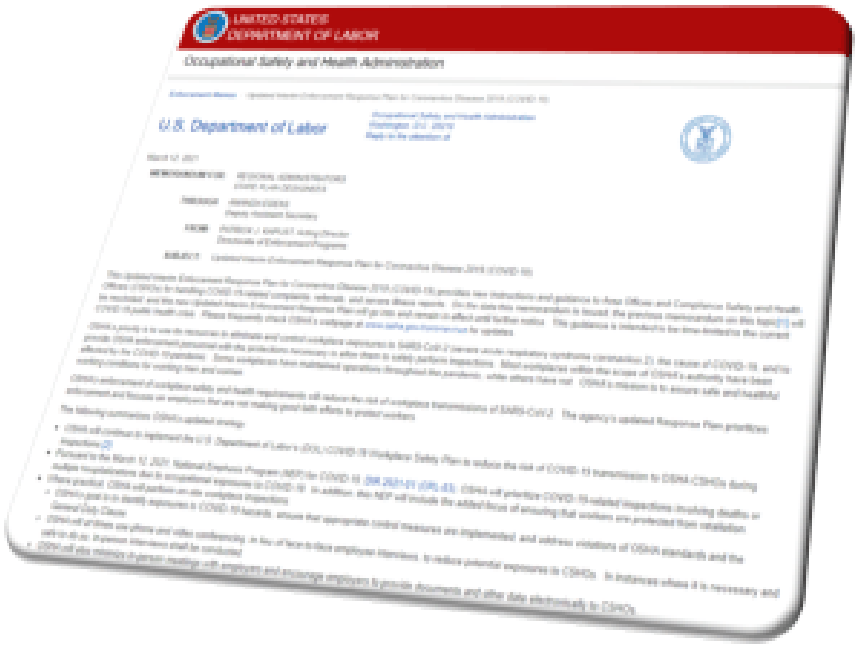
> ***"OSHA has continually conducted outreach at the National, Regional, and Area Office levels throughout the duration of the pandemic outbreak. Thus, the 90-day outreach threshold has been met and Area Offices may begin to initiate inspections under this NEP on the effective date."***

The COVID-19 NEP is scheduled to **remain in effect for up to one year** from today, though OSHA has the flexibility to amend or cancel the program as the pandemic subsides.

While technically in effect right now, OSHA directed its field offices to complete compiling those targeting lists over the next two weeks. So programmed inspections under the NEP will not begin until the end of March, at the earliest, but unprogrammed activities (inspections triggered by fatalities, complaints, or referrals) may proceed immediately.

New Procedures for COVID-19 Inspections

Simultaneously with the announcement of the COVID-19 NEP, OSHA also announced that it has updated its Interim Enforcement Response Plan, which details how OSHA's field staff should conduct COVID-related inspections. There was nothing too earth shattering in the updated response plan, and that is a good thing. This is the tool OSHA has used to outline its COVID-19 recordkeeping guidance, and we have been anxious to see whether Biden's OSHA would depart from the fairly generous work-relatedness guidance issued last summer. They did not disturb that guidance in the updated response plan today.



The update response plan did provide a lot more detail around inspection protocols and violations to look OSHA's field staff will look out for. The biggest takeaway is that it directs Area Offices to prioritize the use of on-site workplace inspections, whereas a lot of activity had been remote to this point. OSHA states that it will use remote-only inspections only if the agency determines that on-site inspections cannot be performed safely. Otherwise, there is not much that changed (at least in writing) about what OSHA is looking for during this inspections and how they will conduct the inspections.

Appendices A and B of the NEP – Industry Target Lists

Targeted Healthcare Industries (by NAICS Code):

- 621111 Offices of Physicians (except Mental Health Specialists)
- 621210 Offices of Dentists
- 621610 Home Health Care Services
- 621910 Ambulance Services
- 622110 General Medical and Surgical Hospitals
- 622210 Psychiatric and Substance Abuse Hospitals
- 622310 Specialty (except Psychiatric and Substance Abuse) Hospitals
- 623110 Nursing Care Facilities (Skilled Nursing Facilities)
- 623210 Residential Intellectual and Developmental Disability Facilities
- 623311 Continuing Care Retirement Communities
- 623312 Assisted Living Facilities for the Elderly

Targeted Non-Healthcare Industries (by NAICS Code):

- 311612 Meat Processed from Carcasses

- 311611 Animal (except Poultry) Slaughtering
- 311615 Poultry Processing
- 445110 Supermarkets and Other Grocery (except Convenience) Stores
- 452112 Discount Department Stores
- 493110 General Warehousing and Storage
- 561320 Temporary Help Services*
- 722511 Full-Service Restaurants
- 722513 Limited-Service Restaurants
- 922140 Correctional Institutions

Supplemental List of Essential Critical Infrastructure Industries (by NAICS Category):

- 11xxxx Agriculture, Forestry, Fishing and Hunting
- 236XXX Construction of Buildings
- 237XXX Heavy and Civil Engineering Construction
- 238XXX Specialty Trade Contractors
- 311xxx Food Manufacturing
- 3121xx Beverage Manufacturing
- 321xxx Wood Product Manufacturing
- 322xxx Paper Manufacturing
- 32412x Asphalt Paving, Roofing, and Saturated Materials Manufacturing
- 32419x Other Petroleum and Coal Products Manufacturing
- 325xxx Chemical Manufacturing Chemical
- 326xxx Plastics and Rubber Product Manufacturing Transportations and Logistics
- 327xxx Nonmetallic Mineral Product Manufacturing
- 331xxx Primary Metal Manufacturing
- 332xxx Fabricated Metal Product Manufacturing
- 333xxx Industrial Machinery Manufacturing
- 334xxx Computer and Electronic Product Manufacturing
- 335xxx Electrical Equipment, Appliance, and Component Manufacturing
- 336xxx Transportation Equipment Manufacturing
- 33711x Wood Kitchen Cabinet and Countertop Manufacturing
- 3399xx Other Miscellaneous Manufacturing
- 44422x Nursery, Garden Center, and Farm Supply Stores
- 445xxx Additional Food and Beverage Stores
- 4523xx General Merchandise Stores, including Warehouse Clubs and Supercenters
- 4851xx Urban Transit Systems
- 4852xx Interurban and Rural Bus Transportation
- 4854xx School and Employee Bus Transportation
- 485991 Special Needs Transportation
- 491xxx Postal Service
- 54142x Industrial Design Services
- 811219 Other Electronic and Precision Equipment Repair and Maintenance

- 81131x Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance