



# The Knock on the Door – Planning for an OSHA Inspection During the Pandemic

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# Disclaimer:



- This presentation should not be construed as legal advice or legal opinion on any specific facts or circumstances.
- You are urged to consult competent legal counsel concerning your situation and any specific legal questions you may have.
- You should specifically seek legal counsel to determine whether the company's facility is subject to state requirements that extend beyond the scope of this outline.

# Questions answered in this presentation:

1. Why might OSHA come knocking on our door?
2. What do we do when OSHA arrives?
3. Do we have to let them in?
4. What will a compliance officer inspect?
5. Do we have to provide documents?
6. How do I handle the facility walk-through?
7. What can I expect during the closing conference?
8. What's next?
9. What are some preventative measures we can take?
  - Review of timelines
  - Q and A

# National Emphasis Program (NEP)

Revised NEP issued 7/7/21 to include Emergency Temporary Standard (ETS) for Healthcare

Interim Enforcement Response Plan – effective for 12 months

- Targets specific high-hazard industries or activities where SARS-CoV-2 hazard is prevalent and workers have an increased potential exposure to this hazard
- Establishments with  $\leq 10$  will be included
- Includes an added focus to ensure that workers are protected from retaliation for reporting safety concerns
- Includes emphasis on the OSHA General Duty Clause

<https://www.osha.gov/enforcement/directives/dir-2021-03cpl-03>



# Why Might OSHA Come for an Inspection?

- Fatality or hospitalization
- Complaints – from employees, former employees, patients, visitors, families
- Referral - referrals from the local health department, or from other federal agencies with joint jurisdictions, such as the Centers for Medicare & Medicaid Services (CMS), media referrals or previous OSHA inspection history
- Programed inspection via Referral National Emphasis Program
- Specific health care industrial codes including physician offices



# The Knock at the Door

## Ask for credentials

- Ask for time to gather your inspection team
- You can require a warrant
- NEVER leave the inspector unattended
- Always Be Courteous
- Inspections are almost always during business hours unless fatality or accident



# What to Expect?

## Opening Conference

- Listen for clues as to why OSHA is there: Complaint? Referral? Emphasis program?
- If the inspection is based on a complaint, ask for a copy or description of the complaint
- Ask what the inspector will focus on, how long to expect
- Show them only the requested documents
- Any statements made will be recorded by the inspector
- Make a list of everyone included in the inspection

# OSHA Inspection Directive; 2021-02 (CPL 02)

- Provides uniform inspection and enforcement procedures for OSHA Compliance Safety and Health Officers (CSHOs) to follow in enforcing the ETS for workplace exposures to the SARS-CoV-2 virus
- All inspections will include a review of the employer's COVID-19 plan and related documents
- Verifying that the employer conducted a hazard assessment; determining whether the employer has administrative and engineering controls in place; assessing compliance with the respiratory protection program; and reviewing employee training records.
- CSHOs will issue citations for violations of the ETS if the employer has not developed or implemented a COVID-19 plan for each worksite or if a facility is missing required parts of the plan.
- [https://www.osha.gov/sites/default/files/enforcement/directives/DIR\\_2021-02\\_CPL\\_02.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/DIR_2021-02_CPL_02.pdf) (issued June 28, 2021)



# Elements of the ETS Covid-19 Plan

- Hazard assessment; coordinator identification
- Patient screening and management
- Standard and transmission precautions; respirators and other PPE
- Limiting exposure to aerosol-generating procedures
- Physical distancing (6 ft), physical barriers, ventilation
- Cleaning and disinfection
- Training
- Employee health screening, medical management,
- Access to vaccination; reasonable time and paid leave
- Anti-retaliation provisions, medical removal protection (MRP)
- Recordkeeping and reporting; working with other employers

# Facility Walk-through

- In plain sight violations – may be cited or referred
- Record what they see and any comments they make
- Notes should focus on:
  - Was there a hazard ?
  - Did OSHA establish that employees were exposed or would have been in the normal cause of work?
  - Did any supervisor know of the violation(s)?
  - Was there a feasible way to protect the workers from the hazard?
- If they take photos, you take photos
- No patients should ever be in the photos

# Employee Interviews

- OSHA can interview employees privately unless an employee requests a union representative
- Employees should be instructed to tell the truth
- Reassure them that they are not in trouble
- Tell them to only answer the questions and not volunteer information
- There are questions that may result in training citations if they cannot be answered by the employee
- Ensure training is in a language and vocabulary that the employee can understand another

# Closing Conference

- Listen carefully – you'll get a feel for violations
- Ask questions
- Don't admit violations or volunteer information
- The CSHO will provide a description of possible citations, but not the penalties or classification of alleged violations
- The CSHO will not debate the alleged violation, and this is not the time for the facility to do so
- Instruction on where citations should be sent (to exact address and person)

# Citations and Notification of Penalty

Lists citations and notification of penalty

Employer options:

- Accept the citation, penalty and abate the violation(s)
- Contest the citation and/or the penalty
- Request an informal conference



You only have 15 working days to contest a finding to the OSHA area office listed on the Citation and Notification of Penalty!

**If you wish to contest any portion of your citation, you must submit a Notice of Intent to Contest in writing to the OSHA area office postmarked within 15 working days after receipt of the Citation and Notification of Penalty.**

# Posting Citations and Notification of Penalty

- Post the citation(s) in an area or on a bulletin board where employee notices normally are posted
- Citation must be posted for 3 days or until abated
- Can also post intent to contest the citation
- Provide a copy to any involved union
- Different time periods apply to different documents



# Abatement

- Review all areas noted by the Compliance Officer
- Make appropriate abatement(s)
- Document abatement or improvements with photos, training rosters, copies of revised policies and procedures
- Post all abatement certifications in the locations where violations were noted
- The employer's certification that abatement is complete must include, for each cited violation, the date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement.
- Ensure all documents submitted to the OSHA enforcement officer (usually the regional office in your state)

# Informal Conference

- Is it worth it? Consider this option in consultation with legal advice
- Meeting with local OSHA director and enforcement officer to formally contest and discuss the citations
- What can you talk about?
  - Citation(s)
  - Abatement period
  - Penalty amount
  - For one or more specific cited items
- Bring to the table what you can/will do beyond simply correcting hazards; proof citations are invalid (e.g., training records)
- Requesting an informal conference does not change the 15-day rule





# Can't Meet the Abatement Date?



Petition for  
Modification  
of Abatement  
(PMA)



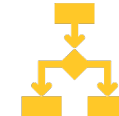
Steps taken  
to achieve  
compliance,  
and dates



Additional  
time needed  
to comply



Why  
additional  
time is  
needed



Interim  
steps taken  
to safeguard  
employees  
against until  
the  
abatement



A  
certification  
that the  
petition has  
been posted



Must remain  
posted for 10  
working days

# Petition for Modification of Abatement

- A petition for modification of abatement date shall be filed with the Area Director of the United States Department of Labor who issued the citation no later than the close of the next working day following the date on which abatement was originally required.
- Petition for Modification of Abatement must be posted for 10 working days
- Affected employees or their representatives may file an objection in writing to such petition with the aforesaid Area Director. Failure to file such objection within ten (10) working days of the date of posting of such petition or of service upon an authorized representative shall constitute a waiver of any further right to object to said petition.

# Preparation

## Inspection plan

- Preventing citations
- Regulatory compliance
- Safety and health program
- Training
- Hazard identification
- Records



# Planning for an Inspection – First Contact

Train front-desk/security on how to react when/if OSHA shows up:

- Who should be contacted, backup supervisor, administration, etc.
- Be courteous and always keep them in sight
- Have a plan for:
  - Requesting warrants (to ask or not to ask...)
  - Document retrieval
  - Notifying Union Representatives
  - Tentative opening conference location



Consider having a “cheat sheet” at registration so that whoever is at the desk can follow the checklist or plan

# Developing the Plan

## Training

- Educate management and employees on their rights and interview techniques
- Conduct mock “OSHA Inspections”
- Bring in a 3rd party on occasion

## Regulatory compliance

- Identify regulations that apply
- Keep track of regulatory changes
- Be aware of enforcement programs, especially the Revised National Emphasis Programs



# ETS Timeline and Enforcement

- Most elements of ETS - implemented by July 6, 2021
- Except physical barriers, ventilation and training - implemented by July 21, 2021.
- State OSHA plans - adopted by July 21, 2021.
- COVID-19-specific ETS makes clear OSHA's authority to separately cite employers for each instance of the employer's failure to protect employees and for each affected employee, where appropriate.
- Serious vs willful citations
  - \$13,653 per **violation** vs \$136,532 per **violation**

# OSHA Citations Timeline and Abatement

- Contest a finding within 15 days to the OSHA area office listed on the Citation and Notification of Penalty submitting a Notice of Intent to Contest in writing to the OSHA area office within 15 working days after receipt of the Citation and Notification of Penalty. [www.osha.gov/laws-regs/regulations/standardnumber/1903/1903.17](http://www.osha.gov/laws-regs/regulations/standardnumber/1903/1903.17)
- Request an informal conference within 15 days to the Assistant Regional OSHA Director <https://www.osha.gov/laws-regs/regulations/standardnumber/1903/1903.20>
- Post citation and notice of penalty for:
  - 3 days if accepted or until abated, whichever is longer
  - 10 days of contested citations/and or penalties
- Abatement – post certificate(s) of abatement in the area of the citation(s)

# Curi – Potential Coverage

- Curi has only had two reports of an OSHA inspection since 2018 – one was earlier this year, before the ETS.
- Insured members who receive a cold call or visit from OSHA should reach out to Curi immediately to determine whether there is an insurance solution.
- This event may trigger your Broad Regulatory Protection coverage.
  - This could mean you may be provided an attorney to assist in responding.
- Contact Lori Oechslin (919) 418-9329 for coverage questions or to report an OSHA visit.



# References

- Interim Infection Prevention and Control Recommendations for Healthcare Personnel During the Coronavirus Disease 2019 (COVID-19) Pandemic Updated 2/23/21

<https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-recommendations.html#previous>

- COVID-19 ETS Materials Incorporated by Reference in § 1910.502

<https://www.osha.gov/coronavirus/ets/ibr>

Discusses CDC cleaning and disinfection guidance, COVID-19 Infection prevention and control guidelines, ventilation, return to work and other key topics.

# Questions?

# Thank you!

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