

LEGAL UPDATES

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# OSHA Issues NEP and Updated Enforcement Response Plan to Combat Workplace Exposure to COVID-19

As mandated by President Biden's January 21 Executive Order, OSHA has announced a National Emphasis Program (NEP) designed to protect workers from contracting COVID-19. On March 12, 2021, OSHA announced its new National Emphasis Program that targets high-risk establishments in high-risk industries for programmed inspections and provides a heightened focus on employers that retaliate against employees who report or complain about unsafe working environments. In conjunction with the NEP, OSHA also issued an updated Interim Enforcement Plan to provide guidance on the policies and procedures it will employ to reduce and eliminate the risk of transmission of COVID-19 in the workplace.

OSHA did not address whether the NEP is in lieu of an Emergency Temporary Standard.

### **National Emphasis Program**

Under the newly launched NEP, OSHA will target enforcement resources on employers in critical, high-hazard industries; whose employees work tasks that have an increased exposure risk to SARS-CoV-2, the virus that causes COVID-19; and that place the largest numbers of workers at risk. As part of the NEP, OSHA will also target employers that retaliate against employees for complaining of unsafe working conditions. OSHA State Plans are encouraged but not required to adopt the NEP and must submit a notice of intent within 60 days of the directive's effective date stating whether the State Plan already has adopted substantially similar policies and procedures, intends to adopt the NEP, or does not intend to adopt the NEP. Because OSHA has conducted

outreach during the last 12 months of the pandemic, it will dispense with the 90-day outreach period and begin inspections under the NEP immediately. The NEP will remain in effect one year from the directive's effective date.

According to the directive, the NEP augments OSHA's unprogrammed inspections related to complaints, referrals and severe incident reports. Under the NEP, the agency will accomplish its goal of decreasing COVID-19 exposures by increasing targeted, planned/programmed and follow-up inspections in workplaces where employees have a high frequency of close contact exposures and where the hazard is prevalent, and by engaging in employer outreach and compliance assistance. Establishments targeted for programmed site inspections will be determined based on two lists generated by the agency that identify 1) high risk industries in healthcare and non-healthcare sectors and 2) critical non-healthcare infrastructure industries having an elevated illness rate based on Form 300A 2020 data. OSHA intends to allocate agency resources so that five percent of each region's total assigned inspections are COVID-19 related and in high-hazard industries. In addition, OSHA will proactively seek to protect workers from retaliation by distributing anti-retaliation information during inspections, employ outreach opportunities and refer allegations of retaliation to the Whistleblower Protection Program.

### **Interim Enforcement Response Plan**

OSHA also issued an updated Interim Enforcement Response Plan (Response Plan) to provide instructions and guidance to area offices and compliance safety and health officers for handling COVID-19 related complaints, referrals and severe illness reports. The agency's updated plan prioritizes enforcement and focuses on employers that are not making good faith efforts to protect workers. It emphasizes that OSHA's goal is to conduct on-site inspections, identify exposures, ensure appropriate control measures are being implemented, and to issue citations for violation of OSHA standards and the General Duty Clause. The updated Response Plan rescinds the earlier interim enforcement plan previously issued on May 19, 2020 and is effective immediately.

### **Contact us**

If you have questions about OSHA inspections under the NEP or other issues related to workplace safety, contact Donna Pryor or your Husch Blackwell attorney.

### **Your comprehensive COVID-19 legal resource**

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact

our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.

*Tracey Oakes O'Brien, Legal Content and Knowledge Manager, is a co-author of this content.*