

## NEW OSHA ENFORCEMENT EFFORTS TARGET HEALTH CARE EMPLOYERS

Recently, the Occupational Safety and Health Administration (“OSHA”) has announced several fines and citations for violations against health care providers. Violations have included failing to provide training on the proper use of a respirator and personal protective equipment, and the failure to report injury, illness or fatality. And this may be just the beginning. Health care providers can expect more frequent inspections and citations in response to the substantial increase in COVID-19-related enforcement funding allocated to OSHA under the recently enacted American Rescue Plan Act of 2021.

### BACKGROUND

OSHA, under the Trump administration, was widely criticized for not doing enough in response to the COVID-19 pandemic. Although OSHA published guidance and an Interim Enforcement Response Plan, studies showed that only a small percentage of OSHA inspections last year were related to COVID-19.

OSHA was also criticized for not exercising its statutory authority to issue an Emergency Temporary Standard (“ETS”) setting forth specific actions employers must take to protect workers from COVID-19. Realizing that an ETS would likely face legal challenges, OSHA relied instead upon its existing regulatory authority to enforce the “General Duty Clause.” The General Duty Clause requires employers to provide a workplace “free from recognized hazards” that are likely to cause serious death or harm to workers.

#### *President Biden’s Emphasis on Worker Safety*

Shortly after his inauguration, President Biden issued an executive **order** directing OSHA to step up its COVID-19 workplace safety enforcement efforts. Specifically, OSHA was directed to launch a national program that would focus enforcement efforts on high-hazard industries where workers have increased potential exposure to COVID-19, and to conduct a national outreach campaign to inform workers and the representatives of their rights under applicable law.

OSHA responded by (i) revising its previously issued COVID-19 guidance, (ii) updating its **Interim Enforcement Response Plan** for COVID-19 and (iii) announcing a new “National Emphasis Program – Coronavirus Disease 2019” (“**Program**”). These last two actions occurred on March 12, 2021 and are a warning sign to health care employers. Flush with new American Rescue Plan funding, a portion of which has been *specifically allocated toward health care industry enforcement*, OSHA has already started conducting on-site inspections that are catching health care employers off guard.

### PROGRAM

The goal of the Program is to significantly reduce or eliminate worker exposures to COVID-19 by targeting industries and workplaces where employees may have a high frequency of close contact exposures. OSHA’s goal will be accomplished by a combination of inspections, outreach to employers and compliance assistance.

On-site inspections will play a critical role in OSHA’s enforcement efforts. The Program formalizes components for planned inspections and follow-up inspections in workplaces where employees have a high frequency of close contact exposures. The scope of inspections and inspection procedures are summarized in OSHA’s Interim Enforcement Response Plan.

Inspections are normally not initiated under a national emphasis program until a required 90-day outreach is conducted. Because OSHA has been conducting outreach at the national, regional and area office levels throughout the duration of the pandemic, OSHA announced that the 90-day outreach threshold has been met and area offices may begin to initiate inspections under the Program as of March 12, 2021.

#### *Emphasis on Protection for Whistleblowers*

With an additional emphasis on retaliation, OSHA has stated that it will establish “an added focus to ensure that workers are protected from retaliation.” Specifically, it will undertake such efforts 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.” During inspections, the agency’s compliance safety and health officers “will inform workers of their right to file a whistleblower

complaint if they experience retaliation for providing assistance to OSHA during an inspection, filing a safety and health complaint with OSHA, reporting a work-related injury or illness, or complaining about [COVID-19] exposure or any other workplace hazards to management...”

The Program is effective for no more than twelve months from March 12, 2021, unless canceled or extended by a superseding directive or the issuance of an ETS.

## **HEALTH CARE PROVIDERS TARGETED**

The Program calls for area offices to create their own inspection targeting goals from OSHA’s master lists to identify workplaces for inspections. OSHA specifically notes that it “anticipates that the majority of the inspections will continue to occur in general industry, particularly in healthcare...” The master lists include industry workplaces with a North American Industry Classification System. The first list includes industries where workers are currently at increased potential exposure to COVID-19. Health care facilities are widely represented on the list, including:

- 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

Health care providers on this list have a greater potential for an OSHA inspection.

## **PRACTICAL TAKEAWAYS AND NEXT ACTIONS**

In the coming year, health care employers should expect that they may be part of OSHA’s new targeted focus on the industry. In the past year, inspections have been largely remote, but the agency will bring increased focus on in-person inspections. Investigators will place their ordinary emphasis on this targeted group’s compliance with OSHA safety and health rules but will also distribute literature and provide other information to employees about their right to be free from retaliation.

To prepare, health care providers should:

- Review and confirm that their policies and procedures for their infection prevention safety measures are in line with the most recent OSHA and CDC recommended guidance.
- Have documents and records demonstrating compliance at the ready for a potential OSHA inspection.
- Consider contacting legal counsel when faced with OSHA citations and fines to explore defense and appeal options and strategies.

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