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OSHA Implications of COVID-19

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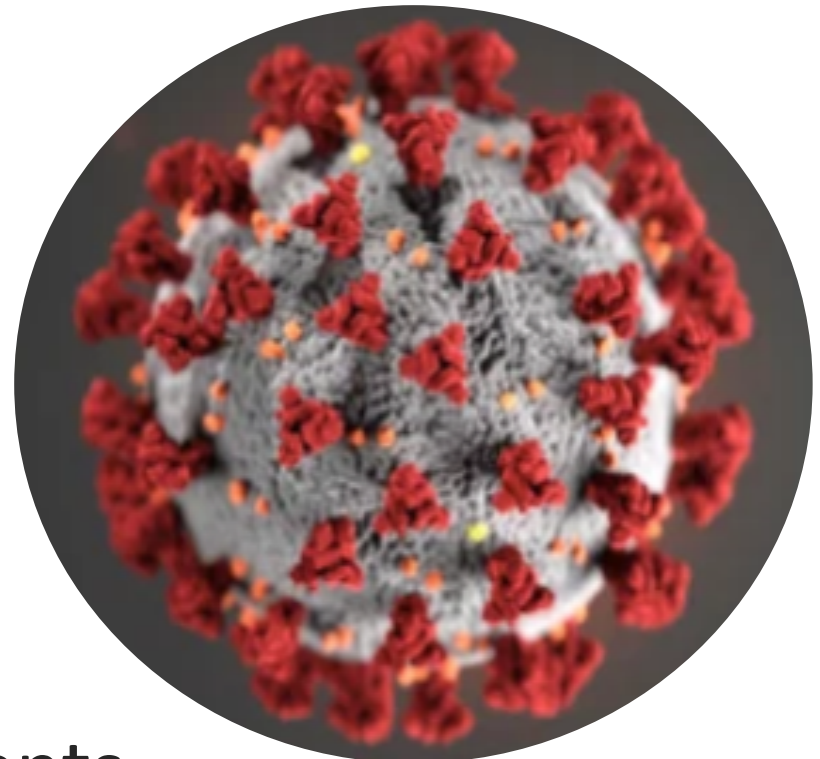
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Eric J. Conn is a founding partner at **Conn Maciel Carey LLP** and Chairs the Firm's national OSHA • Workplace Safety Practice Group:

- Practiced 11 years alongside the former first General Counsel of OSHRC
- Focuses on all aspects of occupational safety & health law
- Represents employers in inspections, investigations and enforcement actions involving OSHA, state OSH Plans, CSB, MSHA, & EPA
- Manages investigations of catastrophic industrial, construction, and manufacturing workplace accidents, including explosions and releases
- Litigates OSHA citations and criminal prosecutions to minimize penalties, abatement requirements, and the impact on tort actions and operations
- Conducts safety training & compliance counseling
- Co-Chair of Conn Maciel Carey's COVID-19 Task Force

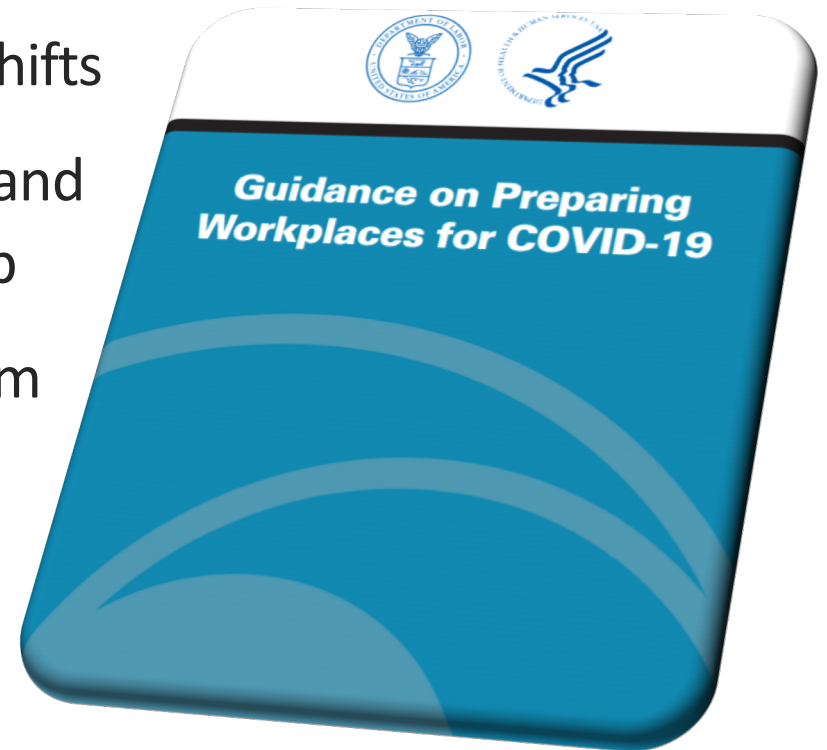
OSHA Agenda

- ✓ OSHA Guidance on COVID-19 Infection Control in workplaces
- ✓ Written Exposure Control and Response Plans
- ✓ Enforcement Discretion Policy re: recurring and other regulatory requirements



Protections to Consider

- Implement COVID-19 Exposure Control Plan / Response Plan
- Temp. PPE Hazard Assessment (consider gloves, gowns, respirators)
- Signage/communication for employees/guests re: hygiene practices
- ID and require sick employees/guests to stay out of the workplace
- Limit workforce / staggered and rotating shifts
- Provide adequate supply alcohol-based hand sanitizer, cleaning supplies, and hand soap
- Enhance workplace housekeeping program
- Discourage use of other workers' phones, desks, offices, tools and equipment
- Implement engineering & admin. controls



Protective Measures to Consider

- Engineering controls (e.g., high-efficiency air filters, increasing ventilation rates, installing physical barriers such as sneeze guards, etc.)
- Admin. controls (e.g., require sick workers to stay home, virtual meetings, implement telework if feasible, job rotations/staggered shifts, etc.)
- Safe work practices (procedures to reduce duration, frequency, or intensity of exposures; e.g., requiring regular hand washing)
- Personal Protective Equipment (e.g., face shields, respiratory protection, gloves, gowns, etc.)

Written Exposure Control Plan

- Overall plan to address a significant hazard (like your Lockout/Tagout Program or Haz/Com Program)
- Should be tailored to your specific site
- OSHA asks for and likes them and many states are even requiring them
- Effective communication tool so your employees know you care and can see what you're doing

Social Distancing

- Signage and communication
- Hall monitors
- Modify/move workstations
- Stagger shifts/breaks/meals
- Reconfigure breakrooms/add new areas
- One-way halls/pathways

Pre-Shift Health Screening

- As a global pandemic, COVID-19 is a “direct threat” to the workplace, so employers may take employee temps. and ask symptom-based questions
- May also ask employees about their symptoms
- Consider where, how to, and who will conduct screening
- Protect the temperature-taker from exposure
- Screening implicates record preservation obligations:
 1. Employers must maintain personal info about employee illness as **confidential** medical record under ADA for 1 year
 2. **Possibly** covered by OSHA’s 1910.1020 – 30+ year retention
- Do not document actual temperature or symptoms - just ✓/X, or Enter/ Do Not Enter



Sanitizing & Disinfecting

- Enhanced daily cleaning
 - Focus on high touch point areas
 - Common areas (tasting room, breakrooms, restrooms)
 - Shared equipment (PITs, LOTO locks, taps, tanks, kettles, vessels, etc.)
- Regular deep cleaning
 - Weekly or bi-weekly
 - In response to confirmed case
 - Third party professional service
- Develop checklist and maintain logs
- Check state & local guidance re: disinfecting & cleaning

OSHA Face Covering, Mask, and Respirator Guidance

- Face covering (cloth mask/bandanas) – not considered PPE and employer does not have to pay for them under 1910.132
- Surgical/dental mask – not PPE if being used *only* as source control (i.e. not to protect workers against splashes and sprays) and employer does not have to pay for them under 1910.132
- However, OSHA has expressed that Sec. 5(a)(1) of the OSH Act may require employers to provide and pay for such masks, as they are intended as a feasible means of abatement in a control plan
- So, we recommend employers provide and pay for masks



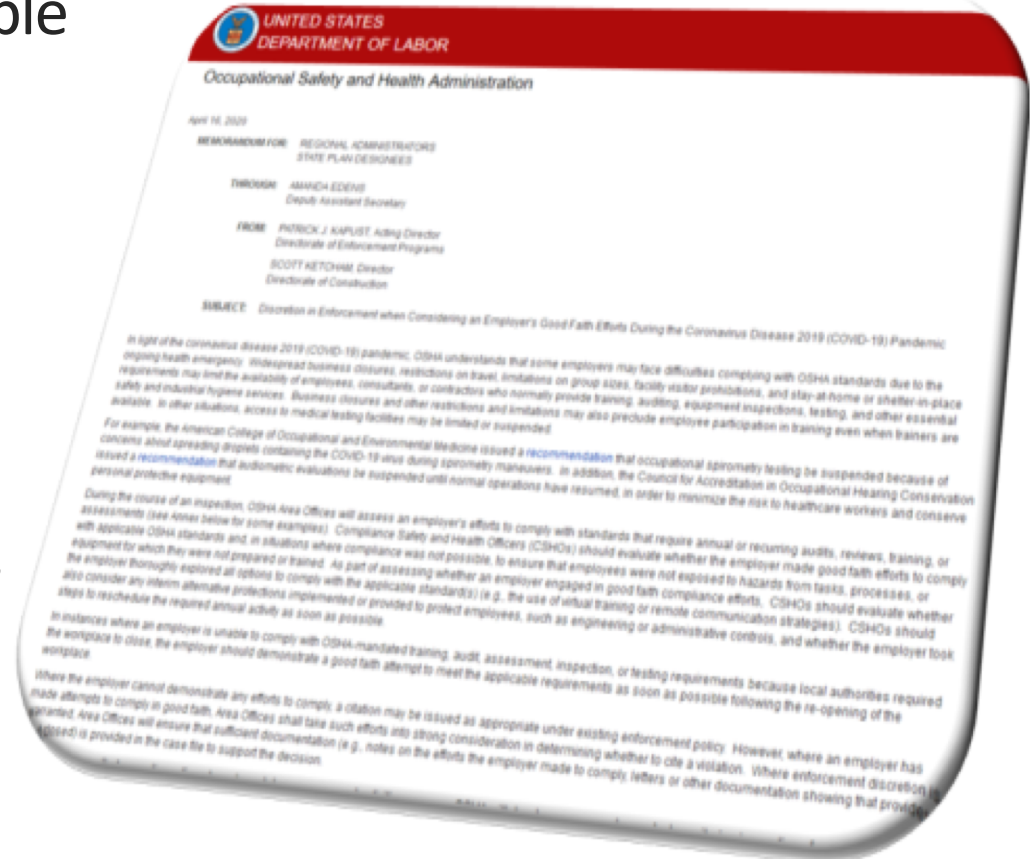


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OSHA's Enforcement Discretion Policy During the Pandemic

New Enforcement Discretion Policy

- April 16, 2020 – New OSHA Enforcement Memo, providing temporary enforcement relief for employers in all industries for many regulatory obligations, if compliance is infeasible or doing so would create an unreasonable COVID-19 exposure risk
- Acknowledges that pandemic has created unprecedented issues for employers trying to meet regulatory obligations – such as annual training, audits, testing, medical surveillance, etc. – w/out creating greater risk of virus exposure



Enforcement Discretion Policy

- If employer is **unable to comply** w/ standard that requires annual/recurring duty (e.g., audit, review, training, assessment, inspection, or testing) b/c of COVID-19, **AND** the employer made **good faith** attempts to comply, OSHA *“shall take such efforts into strong consideration in determining whether to cite a violation”*
- **BUT** where employer cannot demonstrate any effort to comply, or why complying would be more hazardous, citations may issue
- OSHA also expects employers to demonstrate good faith attempts to **return to compliance** as soon as normal operations resume (i.e., the workplace reopens; 3rd party service resumes; and/or social distancing policies expire)

New Enforcement Discretion Policy

- In assessing whether an employer was **unable to comply**, OSHA will look for documentation of efforts to comply or why compliance would be ill-advised, e.g.:
 - Contracts/invoices showing that training/auditing service had been timely scheduled before the outbreak
 - Communications w/ the providers re: cancellation b/c of the pandemic
 - Documentation of good faith efforts to explore other options to comply (e.g., by remote training, virtual inspections, etc.)



New Enforcement Discretion Policy

- In assessing employers' good faith efforts to address the hazard, OSHA will look for documentation of efforts to comply or why compliance would be ill-advised, e.g.:
 - Documentation of good faith efforts to implement interim alternative protections (e.g., engineering or administrative controls not normally used in the normal course of day-to-day operations before the pandemic)
 - Other efforts to address the hazard associated with the compliance obligation (e.g., additional training or audits, reduced throughput)

Enforcement Discretion Policy – Types of Compliance Obligations Covered

- Annex A of memo is a non-exhaustive list of examples of situations where enforcement discretion will be considered:
 1. Annual Audiograms
 2. Annual Hazardous Waste Operations Training
 3. Annual Respirator Fit Testing and Training
 4. Periodic Medical Evaluation for Respirator Use
 5. Crane Operator Re-Certification or Re-Licensing Examinations
 6. **Various PSM requirements (as examples):**
 - **Process Hazard Analysis Revalidations and Compliance Audits**
 - **Annual review and certification of Operating Procedures**
 - **Periodic Refresher Operator Training**
 - **SOP updates / Annual Certifications**
 - **Operator AND M.I. Training**
 - **Closing PHA/Compliance Audit recommendations**

Conn Maciel Carey COVID-19 Task Force Resource Web Page

COVID-19 TASK FORCE

As employers around the country grapple with the employment law and workplace safety implications of the 2019 Novel Coronavirus, "COVID-19," Conn Maciel Carey has formed a multi-disciplinary legal and regulatory task force comprised of our dedicated Workplace Safety, Labor and Employment Law, and Litigation attorneys to help our clients across all industries manage the multitude of pandemic-related issues employers are facing and prepare for potential litigation that is around the corner. We have produced a comprehensive database of resources to guide employers through this uncharted territory and the unique workplace challenges presented by the presence of a new health hazard in our nation's workplaces.

Members of CMC's COVID-19 Task Force

Eric J. Conn OSHA Chair	Kara M. Maciel Labor and Employment Chair	Bryan A. Carey Partner	Nicholas W. Scala MSHA Chair
Kate M. McMahon OSHA Partner	Jordan B. Schwartz Labor and Employment Partner	Andrew J. Sommer Cal/OSHA and Employment Partner	Aaron R. Gelb OSHA and Employment Partner
Amanda Strainis-Walker OSHA Partner	Mark M. Trapp Labor and Employment Partner	Lindsay A. DiSalvo Associate	Megan S. Shaked Associate

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COVID-19 FAQs for Employers

As the COVID-19 Pandemic continues to evolve, we have created an **extensive index of frequently asked questions** about FIR, employment, and MSHA/OSHA related regulatory developments and guidance from federal agencies and the CDC. Conn Maciel Carey's COVID-19 Task Force will be updating our list of FAQs frequently, but please reach out to us for the most up to date information.

- Employee Layoffs & Reduced Working Schedules
- The CARES Act
- Vacation, Paid Time Off & Sick Leave
- OSHA Recordkeeping and Reporting of COVID-19 Cases
- Temperature Checks for Employees
- Personal Protective Equipment
- Preventing Exposure in the Workplace
- Annual Physical Requirements
- Space Restrictions in Retail
- On-Site Inspection Activities
- Employer-Employee Confidentiality
- Emergency Infectious Disease Rule / NEP
- Offer Letters & Flexible Start Dates
- Employer Liability

COVID-19 OSHA Recordkeeping and Reporting Resource Guide

CMC's COVID-19 Task Force has prepared a series of resources to assist employers in assessing whether a COVID-19 diagnosis for one of its employees is reportable to OSHA and/or recordable on the company's OSHA 300 Log, and if so, "how to" record it on the log. The toolkit includes a COVID-19 OSHA Reporting Flow Chart, a COVID-19 OSHA Reporting Flow Chart, a one-pager on "How to record" COVID-19 cases on the log, and a "Work-Relatedness Questionnaire." For more information about the OSHA reporting and reporting implications of COVID-19, [read this detailed article.](#)

Check out our blogs:

the **OSHA DEFENSE** report



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the **EMPLOYER DEFENSE** Report



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... **2020 OSHA WEBINAR** series ...

OSHA's 2019 in Review and 2020 Forecast

Thursday, January 23rd

OSHA Settlement Tips and Strategies

Tuesday, February 25th

Strategies for Responding to Whistleblower Complaints

Wednesday, March 25th

Annual Cal/OSHA Update

Thursday, April 16th

E-Recordkeeping and Injury Reporting Update

Wednesday, May 20th

OSHA's PPE Standards - Top 5 Risks and Mistakes

Tuesday, June 16th

What You Need to Know About OSHA's General Duty Clause

Thursday, July 23rd

Employee Discipline - OSHA and Labor & Employment Issues

Wednesday, August 19th

Privileged Audits and Investigations and OSHA's Self-Audit Policy

Tuesday, September 22nd

Impact of the Election on OSHA

Thursday, October 22nd

Updates about OSHA's PSM Standard and EPA's RMP Rule

Tuesday, November 17th

Impact of America's Aging Workforce on OSHA and Employment Law

Wednesday, December 16th