

OSHA Issues Enforcement Discretion Memorandum Regarding Violations Due to COVID-19
(4/17/2020)

Following on the heels of the U.S. Occupational Safety and Health Administration's (OSHA) issuance of an Interim Enforcement Response Plan detailing how OSHA will investigate COVID-19 related complaints from employees, on April 16th, OSHA issued a [Memorandum](#) encouraging enforcement discretion for certain violations of OSHA Safety and Health Standards during the pandemic.

What does the Memorandum say regarding an employer's inability to comply with an OSHA Standard during the pandemic?

OSHA recognizes that some employers may face difficulties complying with OSHA Standards due to the ongoing health emergency. Widespread business closures, restrictions on travel, limitations on group sizes, facility visitor prohibitions, and stay-at-home or shelter-in-place requirements may limit the availability of employees, consultants, or contractors who normally provide training, auditing, equipment inspections, testing, and other essential safety and industrial hygiene services. Business closures and other restrictions and limitations may also preclude employee participation in training even when trainers are available.

Therefore, during inspections, OSHA indicates that its compliance officers should evaluate whether the employer made "good faith" efforts to comply with applicable OSHA Standards and, in situations where compliance was not possible, to ensure that employees were not exposed to hazards from tasks, processes, or equipment for which they were not prepared or trained. As part of assessing whether an employer engaged in "good faith" compliance efforts, compliance officers should evaluate whether the employer thoroughly explored all options to comply with the applicable Standards (e.g., through the use of virtual training or remote communication strategies). In addition, prior to issuing a citation, a compliance officer should also consider any interim alternative protections implemented or provided to protect employees, such as engineering or administrative controls, and whether the employer took steps to reschedule the required annual activity as soon as possible.

Will an employer be cited for OSHA Standard violations if it exercises "good faith" efforts to comply?

OSHA indicates that an employer may be cited during the pandemic for failure to comply with an OSHA Standard if the employer cannot demonstrate any efforts to comply. However, where an employer has made attempts to comply in "good faith," OSHA requires its regional offices to

take such efforts into strong consideration in determining whether to cite a violation. Where enforcement discretion is warranted, the regional office must provide sufficient documentation (e.g., notes on the efforts the employer made to comply, letters or other documentation showing that providers had closed) in the case file to support the decision.

In order to ensure that corrective actions have been taken once normal activities resume, OSHA will develop a program to conduct monitoring inspections from a randomized sampling of cases where violations were noted, but not cited, based on an employer's "good faith" efforts to comply. Thus, employers should come into compliance as soon as possible in the event of a follow-up OSHA inspection.

Does OSHA provide examples of what constitutes a "good faith" effort to comply?

Yes, OSHA provides a number of examples of what it considers "good faith" efforts to comply. Some of the examples include (1) Process Hazard Analyses recertifications on a three-year basis, (2) annual audiograms for required employees, and (3) annual employee fit testing and training for respirators