



# What Will A Federal OSHA COVID-19 Emergency Temporary Standard Likely Require?

Insights

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As predicted following Joe Biden's election as President of the United States, the new administration announced last week that it has directed the federal Occupational Safety and Health Administration (OSHA) to consider whether emergency temporary standards concerning the COVID-19 pandemic are necessary. The White House asked OSHA to issue any such standards by March 15. If OSHA finds that the workers "are in grave danger due to exposure to toxic substances or agents... and that an emergency standard is needed to protect them," the agency can adopt a temporary standard that will be effective immediately and won't require many of the procedural requirements needed for a permanent standard. Any adopted temporary standard will be in place for at least six months and may eventually become permanent. Given the administration's focus on keeping workers safe during the remainder of the pandemic (and beyond) and the streamlined procedural process for emergency temporary OSHA standards, you should begin to prepare now for the mandates that OSHA will include in a temporary COVID-19 standard.

## Predicting The Federal Standard: Look To What The State Plans Have Done

To anticipate what the federal standard may require, you should look at the emergency COVID-19 standards adopted by the state OSHA plans in Virginia, Michigan, Oregon, and California (several other state plans, like Kentucky, have relied upon executive orders for adopting mandates in lieu of a standard). Private employers in these states, and about 18 other states, are largely governed by state agencies (or state plans) charged with enforcing the OSH Act; federal OSHA governs workplace safety in private workplaces in the balance of states. The four COVID-19 standards adopted by the mentioned state plans have varying requirements, but include several common mandates concerning actions employers must take to combat COVID-19.

Oregon and Michigan's emergency COVID-19 standards largely reiterate the importance of evaluating a workplace for hazards, providing personal protective equipment (PPE), enforcing social distancing and face covering requirements, and training employees on all pertinent COVID-19 policies. On the more aggressive end of the spectrum, California's standard requires, among other things, notification to several parties if a COVID-19 case occurs in the workplace, even greater requirements when there is a COVID-19 "outbreak" (in most situations, defined as three or more COVID-19 cases in 14 days), including testing employees at the worksite, and even provisions regarding paying employees while they are quarantined due to exposure to COVID-19 in the workplace.

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A federal OSHA standard, however, will likely mirror the standard adopted by the Virginia OSHA state plan, which is less aggressive than the California regulation (and more onerous than Oregon/Michigan), but includes several unique provisions with which many employers may have difficulty complying. The Virginia temporary regulation, which is currently in the process of being converted to a permanent standard, requires many employers to, among other things, adopt a written COVID-19 response plan, train employees on COVID-19 practices, assess the risk level of employee exposure to COVID-19 in their workplace, provide PPE and face coverings, provide notification to government agencies and others when COVID-19 cases occur in the workplace, and assess the employer's sick leave policies, number of shifts, etc., to determine if changing those policies will help combat employee exposure to COVID-19.

## **What Will The Federal Standard Likely Require?**

Many of the Virginia standard's requirements will likely be part of the federal regulation. You should expect to see the following requirements in any federal OSHA COVID-19 standard.

### **1. A Written COVID-19 Response Plan**

Like Virginia and other states, the federal COVID-19 standard likely will require many employers to adopt a written COVID-19 response plan. This would set forth the steps the employer is taking and will take to protect employees, along with other provisions the federal regulation will mandate. Expect the federal standard to include appendixes with specific requirements for the response plans of employers in various industries like restaurants, food processing, and retail. Smaller employees (10 or fewer employees) or low-risk workplaces, such as office environments with minimal human interaction, may be exempted from written response plan requirement.

### **2. Reporting And Notification Requirements**

Expect the federal standard, like the temporary regulations in Virginia and California, to require all employers (regardless of industry or exposure risk level) to notify their local or state health department when there is more than one COVID-19 case in their workplace during a given period of time, likely 14 days. If three or more cases of COVID-19 occur in the workplace during the same time period, expect to notify federal OSHA as well. Employers will likewise be required to notify, in writing, all employees at the worksite at issue, and likely any third-parties (e.g., contractors) who were there as well.

### **3. Assessment Of Each Task In The Workplace**

All four of the adopted state plan emergency temporary standards require employers to assess their workplace to determine what level, if any, of risk employees have of being exposed to or contracting COVID-19. This assessment will include, among other things, looking at what personal protective equipment is required for each task completed in the workplace. The level of risk will obviously vary by industry, and the federal emergency standard likely will mandate different requirements based

on the level of risk. Expect the federal standard to require occupancy limits for gathering areas, and face coverings and partitions for all tasks where more than six feet of separation between employees cannot be maintained. Symptom screening of employees and visitors/third-parties prior to entry to worksites may also be required.

#### **4. Training Requirements, Including Instruction On The COVID-19 Response Plan**

Like the state plan standards, expect the federal regulation to require all employers to train workers on COVID-19, its symptoms, and how to stay healthy during the pandemic. Among other types, training on the COVID-19 policies required by the standard will be mandated, as well as training on all required PPE and the outcome of the required risk assessments for each task in the workplace.

#### **What Can Employers Do Now to Be Ready?**

Of course, OSHA can and will continue – even if a temporary COVID-19 standard is adopted – to use the Occupational Safety and Health Act's general duty clause to enforce the general obligation for employers to provide a safe workplace when there is no OSHA standard directly on point (e.g., employer violates the CDC's guidance for employers on COVID-19). If you feel like you need a reminder about these obligations and how they may impact your workplace, you should coordinate with your Fisher Phillips workplace safety counsel.

But given the numerous requirements likely to be included any federal emergency COVID-19 standard and quickly approaching effective date (likely March 15, 2021), you should take steps now to begin ensuring compliance with the inevitable regulation. Here are three steps you can take now to prepare.

#### **1. Train Employees On Existing COVID-19 Policies**

Begin training employees now on any COVID-19 policies you have in place, whether verbal or in writing. Communicating with employees regarding the measures you have taken to keep them safe will not only help with compliance with any future OSHA standard, but also ease any concerns employees may have about their potential exposure to COVID-19. Frightened employees are more likely to lodge complaints and less likely to want to keep working in circumstances where their safety is uncertain.

#### **2. Adopt A Written COVID-19 Policy**

If you haven't already, begin to formalize your COVID-19 workplace policies in written form. The model Virginia COVID-19 response plan is a good starting point for preparing your federal COVID-19 plan. As noted, this likely will be required for most workplaces and will also assist with training your employees. Having written materials makes training employees on your policies easier and more effective.

### 3. Conduct The Currently Required PPE Hazard Assessment

As noted, the federal COVID-19 regulation will likely require you to assess your workplace for potential exposure to COVID-19. A good way to get ahead of this requirement, and stay compliant with existing OSHA regulations, is to conduct a written PPE hazard assessment/certification of each task at your workplace, as required by OSHA's [current regulations on PPE](#):

The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE).

Employers with robust safety programs assess each job task to look for hazards and determine what types of protection, including PPE, are required. In the event of an OSHA complaint or inspection, having completed this task will impress the safety agency and help prevent citations. OSHA provides a [model hazard assessment](#) that employers can use to complete this task.

### Conclusion

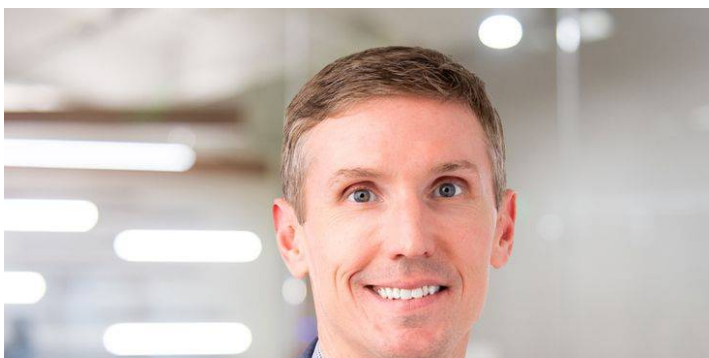
The Biden administration has signaled that a federal OSHA emergency COVID-19 standard is coming soon. Given the numerous requirements it will likely contain for many employers, you should take actions now to ensure that you will be compliant and that your employees stay healthy and safe. You should continue to provide safe workplaces for your employees and invest resources into identifying and eliminating workplace safety hazards at your worksite, in anticipation of the adoption of the COVID-19 standard.

Fisher Phillips will continue to monitor these developments expected over the next four years and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our [Workplace Safety and Catastrophe Management Practice Group](#).

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*This Legal Alert provides an overview of developing workplace issues. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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