



6 Steps Employers Can Take To Diffuse Skyrocketing COVID-19 OSHA Complaints

Insights

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The year 2020 has presented very different workplace safety issues for employers. We have seen an exponential increase in employers receiving notice of complaints to state and federal Occupational Safety and Health (OSHA) agencies from employees regarding COVID-19 safety measures in the workplace – or allegations of a lack thereof. In fact, to date, employees throughout the nation have made more than 11,000 COVID-19-related complaints to federal OSHA and over 39,000 COVID-19-related complaints to state OSHA agencies.

Many of these complaints cite an employer's lack of implementation or enforcement of specific COVID-19 safety measures, such as failure to provide personal protective equipment (PPE), mask wearing, social distancing, or temperature checks. Assuming such complaints will likely continue to skyrocket, employers should be motivated to take immediate steps to ensure they don't find themselves on the receiving end of such a complaint. Here's what you need to know to diffuse potential complaints, including six practical steps you can put into place.

How Does OSHA Respond To COVID-19 Complaints?

Once a complaint is filed, OSHA will either conduct an on-site inspection or a Rapid Response Inspection which is conducted by phone or fax. For workplaces at a higher risk for COVID-19 exposure, such as healthcare providers, residential care workers, and first responders, employee complaints can lead to an active OSHA investigation. Low or medium-risk workplaces (workplaces that require frequent or close contact with people who may be, but are not known to be, infected with the coronavirus) are typically handled as a Rapid Response Inspection.

In most cases, OSHA will send the employer notice of the complaint and request a written response within five days noting corrective actions taken or planned. Employers should carefully review the complaint and provide a full response, including documents or photographs that demonstrate their COVID-19 control measures. While employers should avoid potential admissions, keep in mind that inadequate responses will potentially be escalated and may subject an employer to an on-site inspection.

How To Avoid Potential COVID-19 Complaints And Keep Employees Safe

The question at the heart of many of these COVID-19-related complaints revolve around whether the employer took reasonable measures, based on then existing guidance, to do their best to prevent the spread of COVID-19 in the workplace. Employers can largely avoid OSHA citations by following CDC and OSHA COVID-19 guidance. While not every agency recommendation needs to be implemented, you should have a clear Infection Control Plan or COVID-19 Response Plan, with documentation of measures taken and communicated to employees.

Keep in mind also that the timing of any COVID-19-related precautionary safety measures implemented in any given case, including policies and procedures, will be critical evidence when defending against a potential OSHA citation. Deciding which actions to take and when is no simple task in this constantly changing environment. However, the more effort you make toward providing for the safety of your workers, the less likely OSHA will show up at your door for an on-site inspection.

Here are some best practices to keep in mind, both to help protect employees from illness and to help avoid potential citations.

1. Follow the CDC's Interim Guidance for Businesses, including best practices for social distancing, Guidelines for Cleaning and Disinfecting the workplace, and quarantining employees who have an exposure to a confirmed COVID-19 case, found at the CDC's Public Health Recommendations for Community Exposure. Also, send employees who are symptomatic home until released by a medical professional or until they meet the guidelines for discontinuing self-isolation.
2. If you are an essential business employing critical infrastructure workers, the CDC has adopted different guidelines to follow, including allowing asymptomatic employees who have had a direct COVID-19 exposure to continue to work. The CDC has noted, however, this should only be used as a last resort and in limited circumstances, such as when ceasing operations will impact public health and safety.
3. Utilize OSHA's most recent guidelines as a resource when creating COVID-19 safety measures and policies. While the guidance is in the form of non-mandatory recommendations, OSHA has stated that an organization's good faith efforts to comply with its recommended guidance will be taken into "strong consideration" when determining whether to cite violations and has indicated the General Duty Clause may be the basis for violations if employers do not engage in such good faith efforts. Such citations could also be evidence of an employer's failure in a civil lawsuit.
4. Educate your employees and engage with them. Make sure employees know what measures you are taking to protect them. Be sure you stay aware of their health — while respecting their legal rights to privacy and confidentiality. Constantly remind employees of the symptoms of COVID-19 and urge them to seek medical attention if symptoms appear. Check in with isolated sick employees to ask about their health. An employee with whom you engage will be less likely to file an OSHA complaint.

5. Inform employees of confirmed cases of COVID-19 in the workplace. The CDC recommends that employers notify potentially exposed co-workers of confirmed cases. Err on the side of transparency. Although no case law currently exists, we believe the Occupational Safety and Health Administration may ultimately determine that a failure to notify employees of a confirmed COVID-19 case is a violation of OSHA's General Duty Clause. You should still maintain the privacy of the confirmed employee.
6. Stay on top of current and evolving guidelines. Recommendations from the Centers for Disease Control and Prevention (CDC), the Department of Labor (DOL), Occupational Safety and Health Administration (OSHA) and others, as well as state and local executive orders, continue to evolve, sometimes on a daily basis. You should assign individuals to keep up with changes and share them with management.

More COVID-19 Complaints Are Likely On The Horizon

As noted above, it is anticipated that employees will continue to file complaints with state and federal OSHA claiming that they were exposed to COVID-19 due to inadequate safety policies and practices. You should take appropriate preventive steps not only to curtail potential on-site investigations, but also provide viable defenses should OSHA issue a citation.

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