Training Session Handouts

2021 OSHA Rule Changes: Head Off COVID-19 Violation Penalties

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2021 OSHA COVID-19 Rule Changes: Act Now to Head Off Penalties!

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Executive Order on Protecting Worker Health and Safety

- January 21, 2021 President Biden directed OSHA to:
  - Issue revised guidance to employers on workplace safety during the COVID-19 pandemic;
  - Consider whether emergency temporary standards are necessary. If so, issue them by March 15, 2021;
  - Review enforcements efforts and identify changes that could be made;
  - Launch a national program to focus enforcement efforts on COVID-19 violations that put the most workers at serious risk or go against anti-retaliation principles;
  - Conduct a multilingual outreach campaign to inform workers of their rights.
- January 29, 2021
  - OSHA issued revised guidance.

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New National Emphasis Program.

- Just announced on Friday, March 12, 2021.
- The NEP augments OSHA's ongoing efforts with responding to complaints, referrals, and severe incident reports, by adding a component targeting specific high-hazard industries or activities where the COVID-19 hazard is considered prevalent.
  - National emphasis programs are nothing new to OSHA as they are commonly used when the agency has identified a trend with a particular hazard that requires heightened enforcement attention.
  - It means more targeted enforcement throughout 2021.

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COVID National Emphasis Program

- This new COVID-19 NEP will require OSHA Area Offices to conduct planned/programmed and follow-up inspections in workplaces where employees have a high frequency of close contact exposures as to be at greater risk to COVID-19.
- The NEP is effective on March 12, 2021 and will expire (unless extended) after twelve months.
- The NEP applies to all states that operate under federal OSHA. OSHA strongly encourages states with state OSHA plans to adopt the NEP, but does not require identical adoption. These state plans must submit a notice of intent indicating whether they already have a substantially similar policy in place, intend to adopt new policies and procedures, or do not intend to adopt the NEP.

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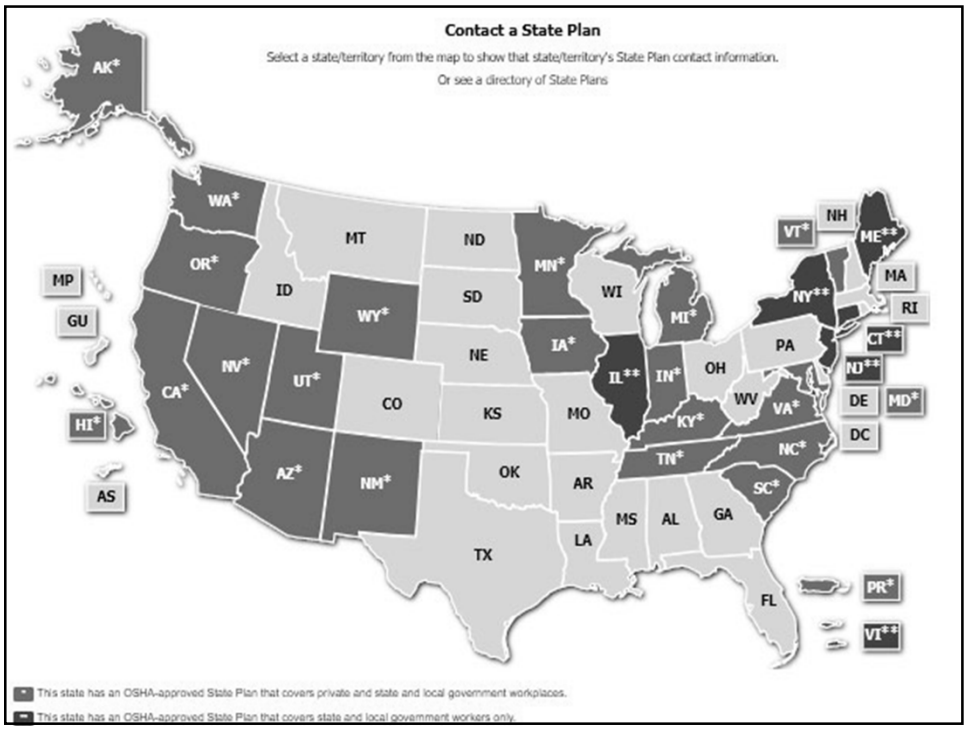

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COVID National Emphasis Program

- Using a list-generation system, OSHA Area Offices will obtain two master targeting lists. Regarding Master List One, each Area Office will generate a master list of establishments from Appendices A and B to the NEP, relying predominantly on NAICS codes in Appendix A. Thus, this NEP heavily targets health and non-healthcare industries in Appendix A.

Appendix A Targets in Health Care		
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 Hospitals	Nursing Care Facilities (Skilled Nursing Facilities)	Residential Intellectual and Development Disability Facilities
Continuing Care Retirement Communities	Assisted Living Facilities for the Elderly	

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COVID 19 National Emphasis Program

- The NEP does prioritize OSHA's enforcement activities regarding COVID-19 for any unprogrammed inspections, meaning when OSHA is inspecting due to a complaint, fatality, etc., and not when it is inspecting because a company is on this NEP target list or some other enforcement targeting list.
- In this regard, the NEP notes that particular attention will be given to workplaces with a higher potential for COVID-19 exposures, such as hospitals, assisted living, nursing homes and other healthcare and emergency response providers treating patients with COVID-19, as well as workplaces with high numbers of COVID-19-related complaints or known cases.

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COVID-19 National Emphasis Program

- Strategy under NEP if you are selected.
- The NEP notes that when the OSHA investigator initiates an inspection, that he/she may choose to verify the employer's assertions regarding workplace conditions or possible existence of worker exposures to COVID-19 by interviewing employee(s) at the site.
  - If it is determined through a review of the injury and illness logs and employer or employee interviews that no such work assignments, recorded cases or reports of positive or suspected COVID-19 exposures resulting in lost work time, hospitalizations or fatalities occurred, and the inspection was initiated as a programmed inspection under the NEP targeting lists, then the investigator is instructed not to proceed with the inspection.
  - In other words, while an employer's industry may be on the Appendix A or B lists, that employer can show that its particular circumstances are devoid of actual COVID-19 exposures.

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COVID 19 National Emphasis Program

- If an investigation does proceed, the investigator is to review the available guidance on COVID-19, including current CDC recommendations and guidelines, in evaluating whether any OSHA standards or the General Duty Clause, Section 5(a)(1), have been violated and if a citation is warranted.
- The NEP notes that because the use of respirators or other personal protective equipment may not completely protect against COVID-19, that employers have obligations under the General Duty Clause to take further measures to protect employees.

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Current COVID Enforcement

- Federal Enforcement:
  - More activity but majority of issues handled through RRI process
    - 12,877 complaints with 12,659 closed
  - Almost $4M in fines through 290+ inspections
    - Total Inspections: 362 complaints + 818 fatality/catastrophic +230 other
- State Enforcement:
  - COVID standards in various states, California, Michigan, Oregon, Virginia
  - More open cases than federal OSHA
    - 42,602 Complaints with 34,102 closed
    - Total Inspections
      - 496 accident +2,140 complaints + 582 fatality/catastrophic + 1600+ other

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Increased Enforcement: General Duty Clause

- Catch-all
- 29 U.S.C. § 654: Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.
- Elements:
  - the employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
  - the hazard was recognized;
  - the hazard was causing or was likely to cause death or serious physical harm; and
  - there was a feasible and useful method to correct the hazard.

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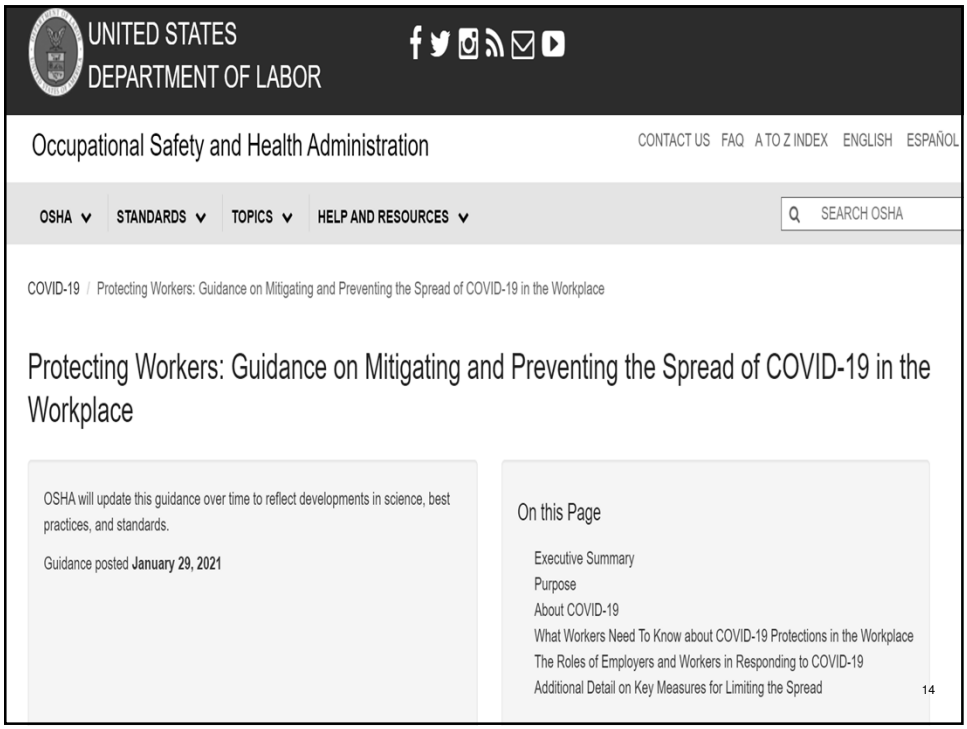

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The Unique Landscape for Health Care Practices

- Don't let your guard down! The new guidance is for "settings outside of healthcare," but the existing healthcare guidance refers back to this guidance for the "most up to date" requirements.
  - The previous healthcare guidance addressed some of the unique additional safety issues when interfacing with patients. Thus, the recommendations in the new guidance would be "the floor" to which health care practices should be in compliance.
  - The obligations in this new guidance inform employers about COVID-19 hazards such that compliance with the new guidance is the best safeguard to avoiding General Duty Clause enforcement.
  - And, with the new COVID NEP, it is critical to focus on every suggested safety control recommended by OSHA.

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The Guidance: Formalize Your COVID-19 Program

- Under the OSH Act, employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm.
- Per OSHA: Implementing a workplace **COVID-19 prevention program** is the most effective way to mitigate the spread of COVID-19 at work.
- Also from OSHA: **The most effective COVID-19 prevention programs engage workers and their representatives in the program's development and implementation at every step, and include the following 16 elements:**

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No. 1: COVID Coordinator

- ***Assignment of a workplace coordinator*** who will be responsible for COVID-19 issues on the employer's behalf.
  - Factors to consider:
    - Who handles non-COVID OSHA/safety compliance?
    - Who understands the issues to ensure compliance?
    - Who has the capacity?
    - Who has the experience and maturity within the organization to handle this?
    - Who will present well if interfacing with OSHA/testifying before a jury?
    - Who would employees feel comfortable with approaching to raise issues or concerns?

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No. 2: Formal Hazard Assessment

- ***Identification of where and how workers might be exposed to COVID-19 at work.*** This includes a thorough hazard assessment to identify potential workplace hazards related to COVID-19. This assessment will be most effective if it involves workers (and their representatives) because they are often the people most familiar with the conditions they face.
  - This is a standard concept in safety. Perform a Job Hazard Analysis and then identify what safety controls are used to remove or sufficiently mitigate the hazard.
  - While you likely have already put the safety controls in place, you may not have:
    - ✓ Documented your assessment as to whether a particular job is low, medium, high, or very high risk of COVID-10 and then identified what controls are being used based on that risk level.
    - ✓ Documented why suggested controls are not feasible.

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No. 2: Hazard Assessment

- Must evaluate risk level.

Examples of healthcare work tasks associated with exposure risk levels

Lower (caution)	Medium	High	Very High
▪ Performing administrative duties in non-public areas of healthcare facilities, away from other staff members. Note: For activities in the lower (caution) risk category, OSHA's *Interim Guidance for Workers and Employers of Workers at Lower Risk of Exposure* may be most appropriate.	▪ Providing care to the general public who are not known or suspected COVID-19 patients. ▪ Working at busy staff work areas within a healthcare facility.	▪ Entering a known or suspected COVID-19 patient's room. ▪ Providing care for a known or suspected COVID-19 patient not involving aerosol-generating procedures.	▪ Performing aerosol-generating procedures (e.g., intubation, cough induction procedures, bronchoscopies, some dental procedures and exams, or invasive specimen collection) on known or suspected COVID-19 patients. ▪ Collecting or handling specimens from known or suspected COVID-19 patients.

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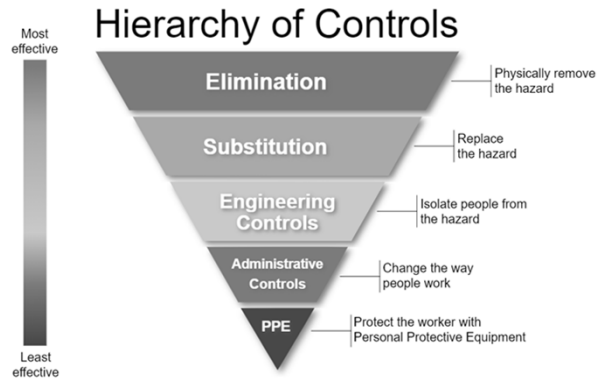
No. 2: Hazard Assessment

- Second Step is to review the recommended controls. The higher the risk level, the more controls.
- Safety controls are based on the Hierarchy of Controls:



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No. 3: Implement the Safety Controls

- ***Identification of a combination of measures that will limit the spread of COVID-19 in the workplace, in line with the principles of the hierarchy of controls.*** **Key examples:**
  - eliminating the hazard by separating and sending home infected or potentially infected people from the workplace;
  - implementing physical distancing in all communal work areas [includes remote work and telework];
  - installing barriers where physical distancing cannot be maintained;
  - suppressing the spread of the hazard using face coverings;
  - improving ventilation;
  - using applicable PPE to protect workers from exposure;
  - providing the supplies necessary for good hygiene practices; and
  - performing routine cleaning and disinfection.

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Engineering Controls – Working with Patients

- Use physical barriers or partitions in triage areas to guide patients, curtains separating patients in semi-private areas, and airborne infection isolation rooms (AIIRs) with proper ventilation. AIIRs are single-patient rooms with negative pressure that provide a minimum of 6 air exchanges (existing structures) or 12 air exchanges (new construction or renovation) per hour.
- If AIIR is not available:
  - Isolate the patient in a private room. If available, negative-pressure rooms (i.e., rooms under negative pressure that may not meet all of the specifications of an ideal AIIR) are preferable to ordinary exam or patient rooms.
  - Keep the room door closed. Isolation tents or other portable containment structures may serve as alternative patient-placement facilities when AIIRs are not available and/or examination room space is limited.
  - Ensure that the room air exhausts directly to unoccupied areas outside of the building, or passes through a HEPA filter, if recirculated.

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Engineering Controls – Employees and Others

- Employers shall ensure that air-handling systems under their control: Are maintained in accordance with the manufacturer's instructions.
- Where feasible, employers shall Install physical barriers (e.g., such as clear plastic sneeze guards, etc.), where such barriers will aid in mitigating the spread of SARS-CoV-2 virus transmission.

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Administrative Controls – Working With Patients

- Restrict the number of personnel entering the room of a patient with suspected or confirmed COVID-19. This may involve training healthcare workers in the appropriate use of PPE so they can perform tasks such as housekeeping and meal service to reduce the need for environmental and food service workers to enter areas where suspected or confirmed COVID-19 patients are isolated.
- Perform as many tasks as possible in areas away from a patient with suspected or confirmed COVID-19.
- Ensure that there are systems in place to:
  - Differentiate clean areas (e.g., where PPE is put on) from potentially contaminated areas (e.g., where PPE is removed);
  - Handle waste and other potentially infectious materials; and
  - Clean, disinfect, and maintain reusable equipment and PPE.

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Administrative Controls – Employees and Others

- Provide face coverings to non-employees suspected to be infected with SARS-C0V-2 to contain respiratory secretions until the non-employees are able to leave the site (i.e., for medical evaluation and care or to return home).
- Implement flexible work site (e.g., telework).
- Implement flexible work hours (e.g., staggered shifts).
- Increase physical distancing between employees at the work site to six feet.
- Increase physical distancing between employees and other persons, including customers, to six feet (e.g., drive-through physical barriers) where such barriers will aid in mitigating the spread of SARS-CoV-2 virus transmission, etc.
- Implement flexible meeting and travel options (e.g., using telephone or video conferencing instead of in person meetings; postponing non-essential travel or events; etc.).

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PPE- Patients

- Healthcare workers must use proper PPE when exposed to a patient with suspected or confirmed COVID-19 or other sources of SARS-CoV-2 (See OSHA's PPE standards at 29 CFR 1910 Subpart I).
- OSHA recommends that healthcare workers with exposure to suspected or confirmed COVID-19 patients wear:
  - Gloves
  - Gowns
  - Eye/face protection (e.g., goggles, face shield)
  - NIOSH-certified, disposable N95 filter facepiece respirators or better
- Use respiratory protection as part of a comprehensive respiratory protection program that meets the requirements of OSHA's Respiratory Protection standard (29 CFR 1910.134) and includes medical exams, fit testing, and training.

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Non-PPE Face Masks

- Provide, at no cost, and require workers to wear face coverings, made of **at least 2 layers** of a tightly woven breathable fabric (i.e., cotton), and should not have exhalation valves or vents.

- ✓ Subject to reasonable accommodation
- ✓ Does not apply to tasks that require respirators
- ✓ Consider alternative masks for workers who are deaf or with hearing deficits
- ✓ Applies to visitors, customers, non-employees
- ✓ Exceptions for children under 2 or when consuming food/drink

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No. 4: HR Accommodation Mandate

- ***Consideration of protections for workers at higher risk for severe illness through supportive policies and practices.*** Older adults and people of any age who have serious underlying medical conditions are at higher risk for severe illness from COVID-19.
  - Workers with disabilities may be legally entitled to "reasonable accommodations" that protect them from the risk of contracting COVID-19.
  - Where feasible, employers should consider reasonable modifications for workers identified as high-risk who can do some or all of their work at home (part or full-time), or in less densely-occupied, better-ventilated alternate facilities or offices.

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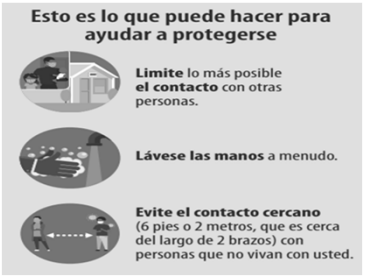
No. 5: Communication System for Employees

- ***Establishment of a system for communicating effectively with workers and in a language they understand.*** Ask workers to report to the employer, without fear of reprisal (see 12 below), COVID-19 symptoms, possible COVID-19 exposures, and possible COVID-19 hazards at the workplace.
  - Communicate to workers, in a language they can understand and in a manner accessible to individuals with disabilities, all policies and procedures implemented for responding to sick and exposed workers in the workplace.
  - In addition, a best practice is to create and test two-way communication systems that workers can use to self-report if they are sick or have been exposed, and that employers can use to notify workers of exposures and closures, respectively.



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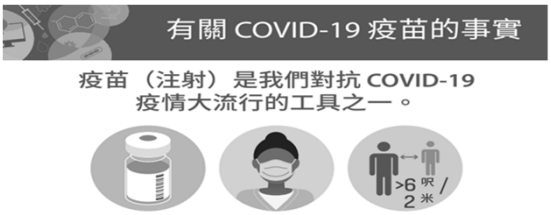
No. 6: Training

- ***Educate and train workers on your COVID-19 policies and procedures using accessible formats and in a language they understand.*** Communicate supportive workplace policies clearly, frequently, in plain language that workers understand (including non-English languages, and American Sign Language or other accessible communication methods, if applicable), and in a manner accessible to individuals with disabilities, and via multiple methods to employees, contractors, and any other individuals on site, as appropriate, to promote a safe and healthy workplace.



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No. 6: Training

- Training should include:
  - Basic facts about COVID-19, including how it is spread and the importance of physical distancing, use of face coverings, and hand hygiene. See About COVID-19 and What Workers Need to Know About COVID-19, above and see more on physical distancing, PPE, face coverings, and hygiene, respectively, below;
  - Workplace policies and procedures implemented to protect workers from COVID-19 hazards (the employer's COVID-19 prevention program); and
  - Some means of tracking which workers have been informed and when.

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Nos. 7, 8, and 9

- ***Instruct workers who are infected or potentially infected to stay home and isolate or quarantine*** to prevent or reduce the risk of transmission of COVID-19. Ensure that absence policies are non-punitive. Policies that encourage workers to come to work sick or when they have been exposed to COVID-19 are disfavored.
- ***Minimize the negative impact of quarantine and isolation on workers.*** When possible, allow them to telework, or work in an area isolated from others. If those are not possible, allow workers to use paid sick leave, if available.
- ***Isolating workers who show symptoms at work.*** Workers who appear to have symptoms upon arrival at work or who develop symptoms during their work shift should immediately be separated from other workers, customers, and visitors, sent home, and encouraged to seek medical attention.

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No. 10: Cleaning Procedures

- ***Performing enhanced cleaning and disinfection after people with suspected or confirmed COVID-19 have been in the facility***. If someone who has been in the facility is suspected or confirmed to have COVID-19, follow the CDC cleaning and disinfection recommendations. This includes:
  - **Closing areas** used by the potentially infected person for enhanced cleaning.
  - **Opening outside doors and windows** to increase air circulation in the area.
  - **Waiting as long as practical** before cleaning or disinfecting (24 hours is optimal).
  - Cleaning and disinfecting **all immediate work areas and equipment used by the potentially infected person**, such as offices, bathrooms, shared tools and workplace items, tables or work surfaces, and shared electronic equipment like tablets, touch screens, keyboards, and remote controls.

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No. 10: Cleaning

- **Vacuuming the space if needed**. Use a vacuum equipped with a high-efficiency particulate air (HEPA) filter, if available. Wait until the room or space is unoccupied to vacuum.
- **Providing cleaning workers with disposable gloves**. Additional PPE (e.g., safety glasses, goggles, aprons) might be required based on the cleaning/disinfectant products being used and whether there is a risk of splash.
- After cleaning, **disinfecting the surface with an appropriate EPA-registered disinfectant on List N: Disinfectants for use against SARS-CoV-2**.
- **Following requirements** in OSHA standards 29 CFR 1910.1200 and 1910.132, 133, and 138 for hazard communication and PPE appropriate for exposure to cleaning chemicals.

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No. 10: Cleaning

- Once the area has been **appropriately disinfected**, it **can be opened for use**. **Workers without close contact** with the potentially infected person can return to the area immediately after disinfection.
- If it is **more than 7 days** since the infected person visited or used the facility, additional cleaning and disinfection is not necessary. Continue routine cleaning and disinfection, described below.

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No. 11: Screening and Testing

- ***Providing guidance on screening and testing:*** Follow state or local guidance and priorities for screening and viral testing in workplaces.
  - This is a deferential issue regarding both screening and testing by federal OSHA.
  - However:
    - Under the Virginia COVID standard for medium, high or very high risk employees, prior to the commencement of each work shift, prescreening or surveying shall be required to verify each covered employee does not have signs or symptoms of COVID-19.
    - Same under the Oregon temporary COVID standard for high and very high risk.
    - All job positions require screening under Michigan's temporary standard.
    - Cal-OSHA requires screening of all under its emergency standard and requires testing to be provided and paid for by the employer.

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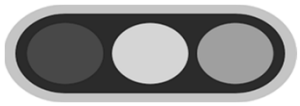
Cal-OSHA Testing, Etc.

If an employee has a COVID-19 exposure in the workplace:

- Notification obligations triggered
- Testing
- Exclude employees
- Follow the return to work criteria
- Investigate the exposure and address hazards
- Follow recording and reporting requirements



If its an outbreak, ADD

- Immediately test and test one week later
- Continue testing weekly until workplace is no longer an outbreak

If a major outbreak, ADD

- Test at least twice weekly until no new cases for 14 days
- Ventilation changes
- Consider HEPA air filtration units
- Consider respiratory protection or stopping operations to control the spread

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No. 12: OSHA Recordkeeping and Reporting

- ***Recording and reporting COVID-19 infections and deaths.***
  - However, non-Hospital health care practices are exempt from keeping OSHA logs:

211	Offices of Physicians.
6212	Offices of Dentists.
6213	Offices of Other Health Practitioners.
6214	Outpatient Care Centers.
6215	Medical and Diagnostic Laboratories

But, **still must report** in-patient hospitalizations or fatalities (and amputations and loss of an eye).

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No. 12: Reporting to OSHA.

- COVID reportability. Assuming it is work-related:
  - You must make the report to OSHA within the following time period after the fatality, in-patient hospitalization, amputation, or loss of an eye is reported to you or to any of your agent(s): Eight (8) hours for a fatality, and twenty-four (24) hours for an in-patient hospitalization, an amputation, or a loss of an eye (assuming the hospitalization (etc.) occurred within 24 hours of a work-related event or exposure).
  - You only report the fatality if it occurred with 30 days of the work-related event or exposure.

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How Does an Employer Determine if the Employee Contracted COVID-19 at work?

- On the issue of work-relatedness determinations, OSHA's enforcement guidance indicates that an employer needs to complete a "reasonable" inquiry into work-relatedness, but does not need to undertake "extensive medical inquiries." The agency's guidance also states that in general, a reasonable inquiry will include investigation into the following:
  - How the employee believes he or she may have contracted COVID-19 through discussions with the employee if possible; and
  - Review of possible work exposures, such as by investigating whether there was an interaction with an individual known or suspected of having COVID-19 in the workplace.
- Ultimately, the standard is: "If, after the reasonable and good faith inquiry, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record/report the COVID0-19 illness."

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No. 13: Anti-Retaliation

- ***Implementing protections from retaliation and setting up an anonymous process for workers to voice concerns about COVID-19-related hazards:*** Section 11(c) of the OSH Act prohibits discharging or in any other way discriminating against an employee for engaging in various occupational safety and health activities. For example, employers may not discriminate against employees for raising a reasonable concern about infection control related to COVID-19

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Nos. 14 and 15

- Make a COVID-19 vaccine or vaccination series ***at no cost*** to all eligible workers

- Provide ***information and training*** on the benefits and safety of vaccinations.
- ***Continue to follow protective measures*** in the workplace even if workers are vaccinated, i.e. wear masks and maintain physical distancing.
  - The evolving nature of when "can we return to normal?"

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No. 16

- ***Other applicable OSHA Standards:*** All of OSHA's standards that apply to protecting workers from infection remain in place. These standards include: requirements for PPE (29 CFR 1910, Subpart I (e.g., 1910.132 and 133)), respiratory protection (29 CFR 1910.134), sanitation (29 CFR 1910.141), protection from bloodborne pathogens: (29 CFR 1910.1030), and OSHA's requirements for employee access to medical and exposure records (29 CFR 1910.1020).

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Final Thoughts

- Compliance is Key – Audit and Inspection Procedures
- Have a plan for what to do if OSHA shows up
- Good internal "open door" response is better than an employee calling OSHA
- And, remain on the lookout for more from OSHA.
- Questions?

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