

OSHA Update: COVID-19, Top 10 and Trends

Presented by:

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PPSA

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Speaker

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Agenda

- Introduction
- Top 10
- OSHA COVID-19 enforcement plan, data
- OSHA COVID-19 enforcement guidance
- Inspections
- Recordkeeping/Reporting
- Trends for Near Future
- Recommendations

Introduction

- Focus of employers – COVID-19 protection/compliance
- OSHA's focus, too
- Employment and labor laws, including the OSHAct don't fully contemplate this unprecedented situation
 - Be careful about absolutes in advice and opinions
 - Get advice from reliable sources
 - General materials are not legal advice for specific situations
- OSHA isn't "back to normal"
- Be safe, kind, and patient with each other

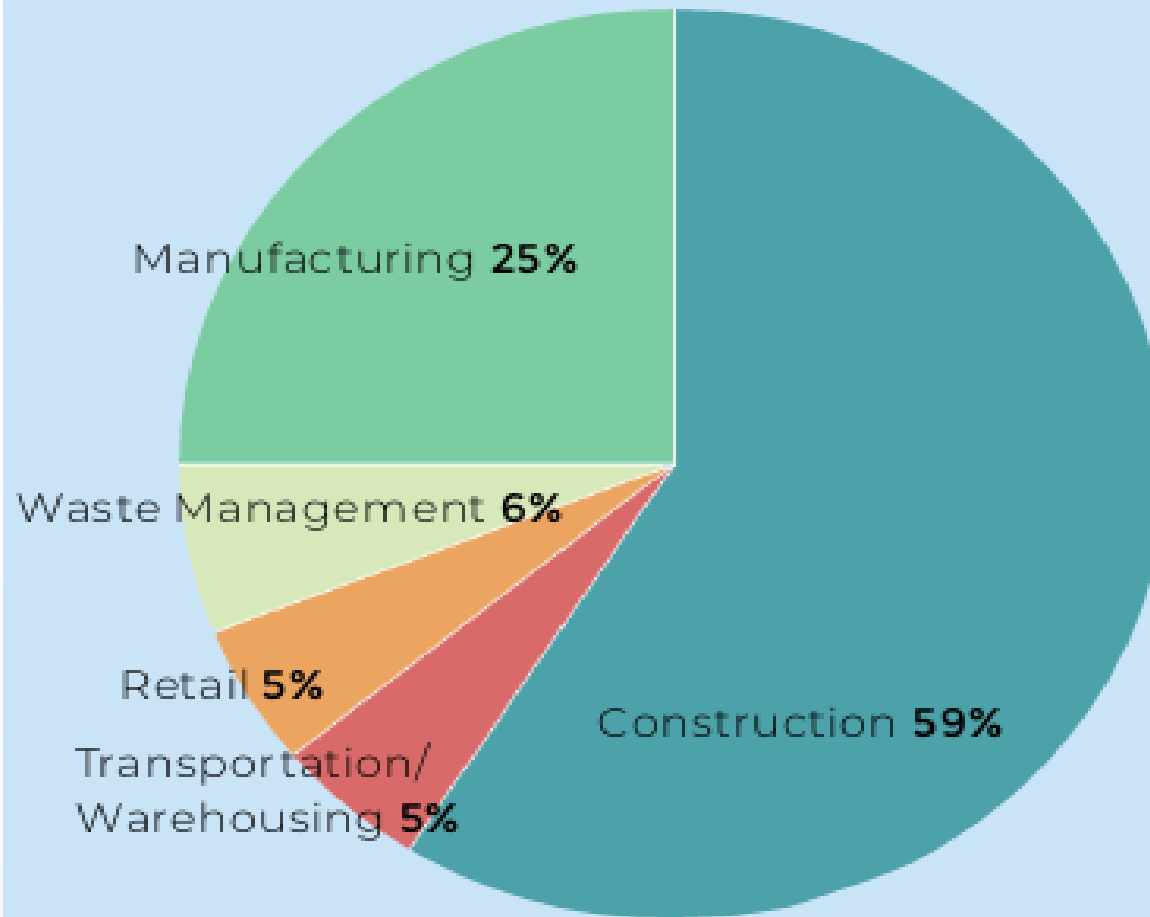
Unprecedented Challenges for Employers

- Orders canceled
- Government ordering businesses to shut down
- Significant loss of business
- Economic recession
- Wage reductions, shift changes, furloughs, voluntary separation programs, reductions-in-force
- Employee safety

Unprecedented Challenge of COVID-19 to OSHA

- Never before a pandemic (since 1970)
- Reasonable/unreasonable concerns of employees, employers, government agencies
- State, county and municipal orders
- “Shifting sands” of expert guidance (CDC)
- Difficulty of associating infection with work
- Risks of exposing CSHOs to infection
- Political pressures

OSH Investigations: **Top 5** Industries in 2019



Source: U.S. Department of Labor

OSHA Update: COVID-19, Top 10 and Trends

FY19 Top Ten Most Frequently Cited Violations - Manufacturing

1. 1910.147 – Lockout/Tagout
2. 1910.1200 – Hazard Communication
3. 1910.134 – Respiratory Protection
4. 1910.212 – Machine Guarding
5. 1910.178 – Powered Industrial Trucks
6. 1910.305 – Electrical – Wiring
7. 1910.219 – Power Transmission
8. 1910.95 – Occupational Noise
9. 1910.303 – Electrical – General
10. 1910.1053 – Silica

How Does OSHA Inspect Nowadays?

- RRI
- Remote
- In-person

OSHA Inspection Enforcement Plan – Pre-May 25, 2020

- Complaint, RRI, and “virtual/remote” inspections
- Employer-reported hospitalizations handled using the rapid response investigation (RRI) in most cases
- Fatalities and imminent danger exposures related to COVID-19 prioritized for inspections, with high focus on healthcare organizations and first responders
- All other formal complaints alleging COVID-19 exposure, where employees are engaged in lower risk jobs, will/did not normally result in an on-site inspection

OSHA Inspection Enforcement Plan – May 26, 2020 To Date

- In geographic areas where significant decrease in community spread of COVID-19, return to more “normal” inspection planning:
 - Continuing to prioritize COVID-19 cases; and
 - Utilizing non-formal phone/fax investigations or RRI in circumstances where OSHA has historically performed such inspections (e.g., to address formal complaints); and
 - Increasing in-person inspections

OSHA Inspection Enforcement Plan – May 26, 2020

- In geographic areas where sustained community transmission of COVID-19:
 - Continued focus on fatalities and imminent danger exposures for inspection
 - Particular attention to high-risk workplaces, such as healthcare, and workplaces with high numbers of complaints and/or known COVID-19 cases
 - Typically initiated remotely with on-site component if/when resources available
 - Where limitations on resources require, RRIs to identify hazards and confirm abatement
 - Developing program to conduct monitoring inspections from randomized sampling of fatality or imminent danger cases where inspections were not conducted

Federal OSHA COVID-19 Cases/ Inspections

- January 1 through December 30, 2020
 - Complaints 12,083
 - Referrals 1832
 - Inspections 1443
 - Closed cases 11,730

State OSHA COVID-19 Cases/ Inspections

- January 1 through December 30, 2020
 - Complaints 39,937
 - Referrals 5765
 - Inspections 2,153
 - Closed cases 32,451

April 16, 2020, OSHA Enforcement Guidance

- <https://www.osha.gov/Publications/OSHA3990.pdf>

This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace.

April 16, 2020, OSHA Enforcement Guidance

The Occupational Safety and Health Administration (OSHA) developed this COVID-19 planning guidance based on traditional infection prevention and industrial hygiene practices. It focuses on the need for employers to implement engineering, administrative, and work practice controls and personal protective equipment (PPE), as well as considerations for doing so.

April 16, 2020, OSHA Enforcement Guidance

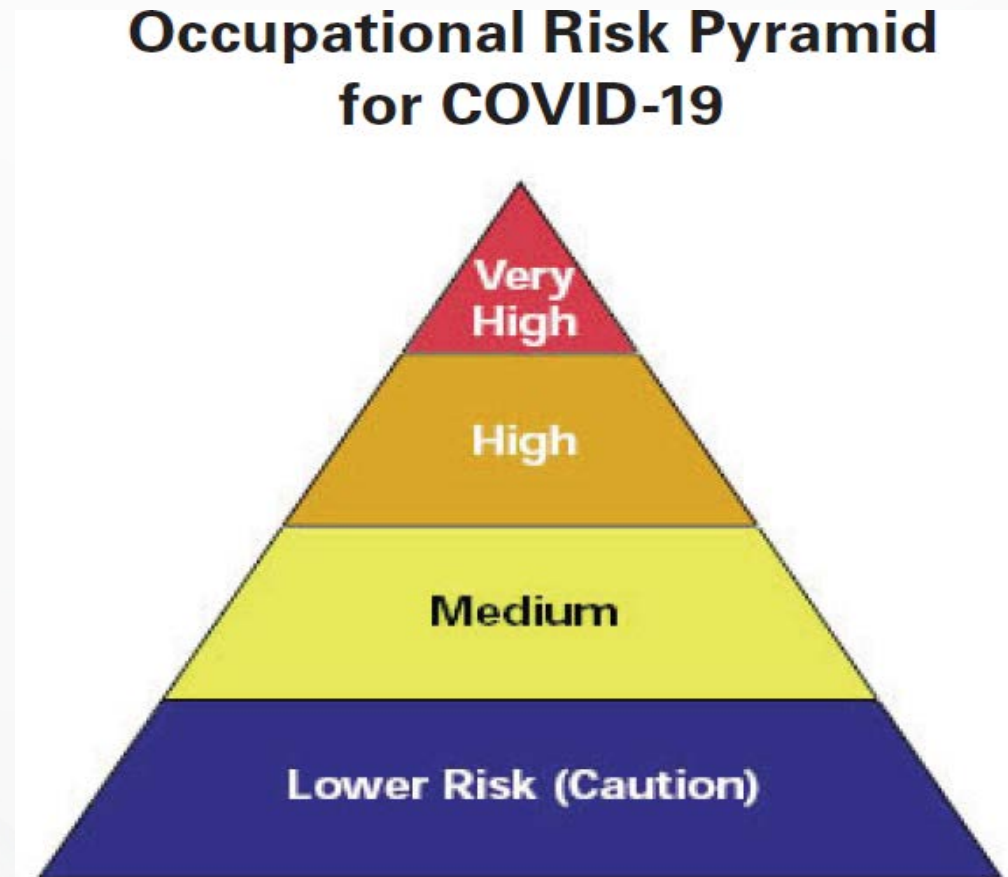
- Theme: Grace
- Focus on employers' good faith efforts to meet OSHA deadlines
- Limited availability of employees, consultants, or contractors providing training, auditing, equipment inspections, testing, and other essential safety and industrial hygiene services

April 16, 2020, OSHA Enforcement Guidance

- For example:
 - PPE availability
 - Annual audiograms
 - Respirator Fit Testing and Training
 - Crane inspections
 - Crane operator certifications
 - PSM revalidations, refresher training

April 16, 2020, OSHA Enforcement Guidance

- Classifying Worker Exposure to SARS-CoV-2



OSHA Update: COVID-19, Top 10 and Trends

OSHA's Focus in COVID Inspections

- Recordkeeping and Reporting
- PPE
- Sanitation
- Respiratory Protection
- General Duty Clause -- CDC/OSHA guidance
 - Face coverings
 - Social Distancing
 - Engineering controls
 - Other administrative controls

What Is Being Cited (Non-Healthcare)?

- Compliance with all CDC guidelines (cleaning, social distancing, PPE, etc.) – “20/20 hindsight” problem
- Absence of COVID-19-related policies and procedures
- Hazard assessment/PPE selection, availability and training
- Housekeeping/Sanitation
- Inadequate training on COVID-19-related policies and procedures
- Failure to comply with COVID-19-related Executive Orders being enforced by certain state plans

800-Pound Gorilla: The General Duty Clause



SEC. 5. DUTIES

- (a) Each employer --
- (1) 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;
 - (2) shall comply with occupational safety and health standards promulgated under this Act.
- (b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

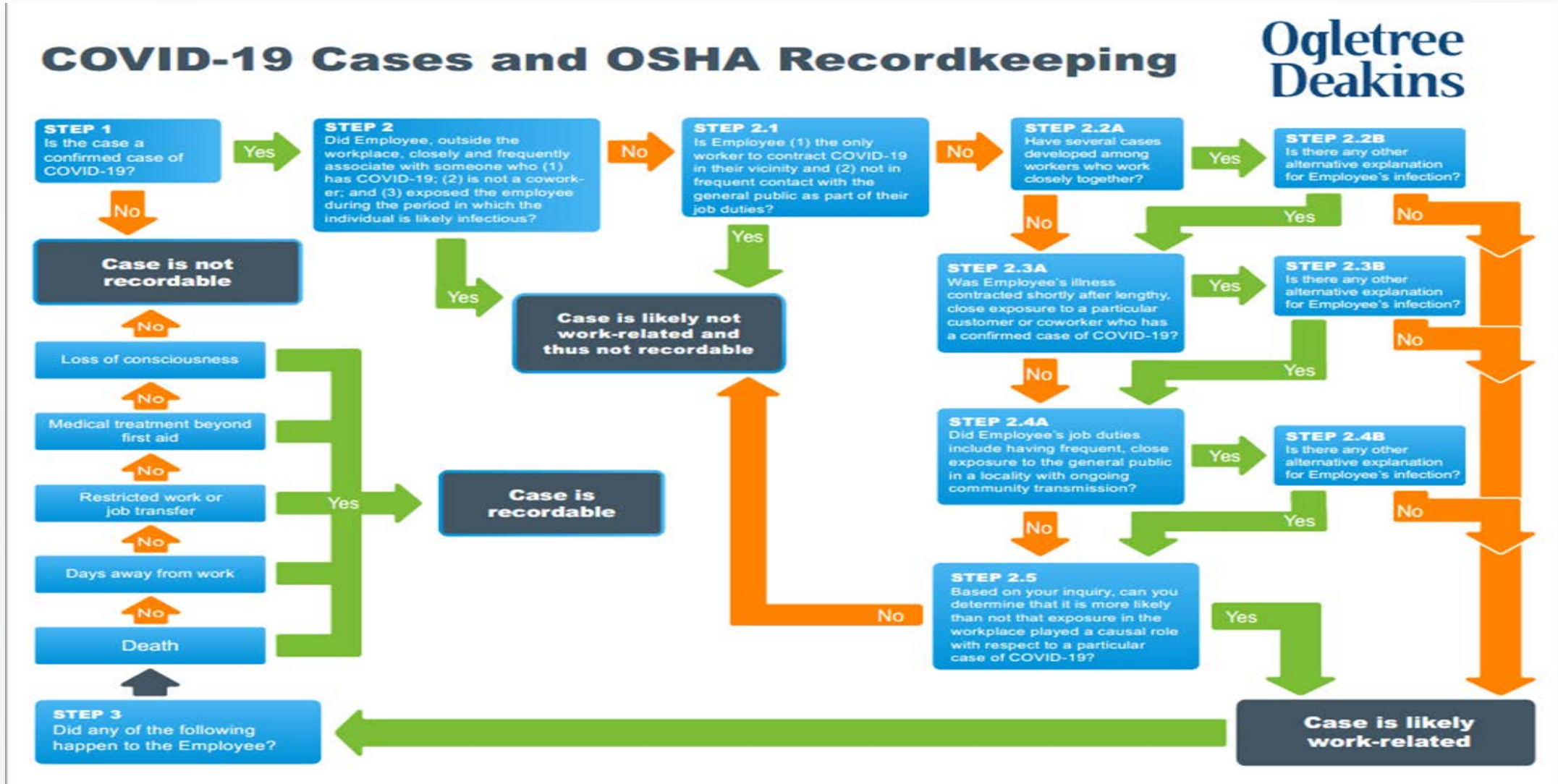
800-Pound Gorilla: The General Duty Clause

- OSH Act of 1970, Section 5(a)(1)
- “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”
- Examples: heat stress, workplace violence, work zone safety (internal traffic control plans)
- COVID-19 Global Pandemic?
- What about specific workplaces or types of workplaces?

Recordkeeping and Reporting

- Recordability/reportability depend on work-relatedness
 - Good faith analysis – documented
 - Detailed documentation of all contact tracing in format for potential production to OSHA
- If not, very likely to lead to inspection

Recording COVID-19 Cases



Reporting COVID-19 Cases

- Rule: Must report confirmed case that is work-related:
- Confirmed case means individual that has had at least one positive COVID-19 test
- Case is work-related if event or exposure in work environment either caused or contributed to resulting condition or significantly aggravated pre-existing injury or illness
- Difficult to determine work-relatedness, given nature of COVID-19 and how easily virus can spread in communities
- OSHA using enforcement discretion – some state plans trickier

Note: June 18, 2020, OSHA Return-to-Work Guidance

- Emphasizes CDC guidelines compliance
- Recommends remote/tele-work where possible
- Addresses same emphases of enforcement guidance
 - Occupational exposure
 - Hierarchy of controls
 - Distancing
 - Masks
 - Sanitation
 - Training
 - Employee returns-to-work post-exposure or and-infection

New COVID-19 Guidance – January 29, 2021

- “COVID-19 Prevention Program”
- Little reference to OSHA standards/General Duty Clause
- Plenty of reference to CDC guidelines
- 12 elements of program
 - Assignment of workplace coordinator
 - Hazard assessment
 - Identification of measures to limit spread – in line with hierarchy of controls
 - Consideration of protections for workers at higher risk
 - Establishment of system for communicating effectively with employees in language(s) they understand

New COVID-19 Guidance – January 29, 2021

- 12 elements of program
 - Education and training on COVID-19, COVID-19 policies/procedures in language(s) employees understand
 - Direction to workers to go/stay home if infected or potentially infected
 - Minimization of negative impact on workers – telecommuting, use of paid sick leave
 - Isolation of workers who are symptomatic at work
 - Enhanced cleaning/disinfection after potentially infected person in workplace
 - Protections from retaliation; anonymous process for reporting concerns
 - Provision of vaccination opportunity “at no cost”

Trends for Near Future

- New personnel – KEY
 - New Deputy Asst. Secretary of Labor – OSHA (political)
 - Jim Frederick
 - Former USW Asst. Dir. of Safety



Trends for Near Future

- New personnel – KEY
 - New OSHA Chief – TBD
 - Jim Frederick?
 - Doug Parker (Cal-OSHA)?



Trends for Near Future

- New personnel – KEY
 - New “Senior Advisor” (??) – Ann Rosenthal



Trends for Near Future

- Old personnel – KEY
 - Same Assoc. Solicitor of Labor for OSH – Ed Baird



Trends for Near Future

- Emergency Temporary Standard – COVID-19
 - No formal rulemaking
 - No notice and comment
 - That is, no formal stakeholder input
 - For no more than six months; then OSHA must publish proposed rule
 - But ...
 - Can OSHA extend?
 - Can OSHA modify?

Trends for Near Future

- Emergency Temporary Standard – COVID-19
 - Executive Order
 - OSHA “to consider” an ETS
 - March 15 deadline - impossible
 - Likely to look like January 29 guidance?
 - If not, likely to be based on infectious disease standard – draft from Obama OSHA days
 - What will it include?

Trends for Near Future

- Emergency Temporary Standard – COVID-19
 - Gaze into my crystal ball ...
 - Housekeeping
 - Sanitation
 - Hazard assessment/PPE
 - Administrative controls (distancing)
 - Vaccine?
 - Reporting?
 - Likely to incorporate CDC guidelines in some form
- Emphasis program to target industries with reportedly/actual high rates of COVID-19 instances

Trends for Near Future

- Continued loss of agency personnel – aging → resources stretched thin
- OSHA offices (most) still closed to conferences
- Focus by OSHA on COVID-19 until vaccine/herd immunity
- Continued “remote” inspections
- Continued focus by OSHA on fatalities, amputations, hospitalizations (eye losses)
 - Primarily reactionary
- Proactivity limited for a while to:
 - Targeting/Emphasis Program (SST-17 published in December)
 - Schedule (construction)

Recommendations

- Watch for that ETS!
- Monitor latest guidance (OSHA and CDC) and review OSH policies/procedures
- Prepare!
 - Familiarize self with OSHA guidances/CDC guidelines
 - Understand OSHA's inspection emphases
 - Consider Top 10
 - Document
- Be flexible, but consistent

Thank you!

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