

# **COVID-19 Related OSHA Citations -- Control Measures, Recordkeeping and Reporting Requirements**

**December 9, 2020**

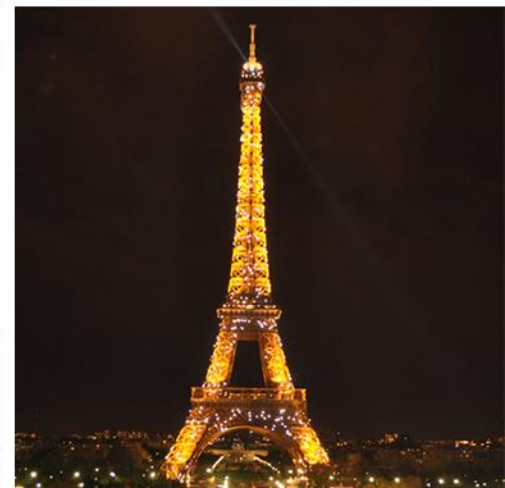
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- Citations alleging inadequate COVID-19 control measures
  - Fed-OSHA and States without infectious disease standards or COVID-19 ETS
  - States with infectious disease standard or COVID-19 ETS
- Citations alleging failure to record or report work-related COVID-19 cases
  - Recording
  - Reporting

- Cite requirements in standards applicable to COVID-19
  - PPE
    - To date, citations limited to healthcare sector (per recent OSHA report)
    - Emergency response team
    - Changing HVAC system filters
  - Respiratory protection
    - Healthcare (including plant medical staff)
    - Emergency response team
    - Changing HVAC filters
    - Whenever mandated by employer
  - Access to Employee Exposure and Medical Records
    - Hazard/risk assessment
    - Contact tracing
- General Duty Clause

## ▪ **1910.132- Personal Protective Equipment**

- Section (a) Application:
  - Employer did not provide, use, and maintain protective equipment in a sanitary and reliable condition
- Section (d) Hazard Assessment and Equipment Selection:
  - Employer did not:
    - Perform PPE hazard assessment to determine PPE requirements
    - Select, and require the use of, appropriate and properly fitting PPE
    - Communicate selection decisions to each affected employee
- Section (f) Training:
  - Employer did not provide training to each employee is required to use PPE

# Common OSHA COVID-19 Citations



## ■ 1910.134 Respiratory Protection

- **Section (a) Permissible Practice:**
    - Failure to provide respirator.
  - **Section (c) Respiratory Protection Program:**
    - Inadequate written respiratory protection program.
  - **Section (d) General Requirements:**
    - Failure to provide an appropriate respirator
  - **Section (e) Medical Evaluation:**
    - Failure to provide medical evaluation before fit-testing or use
  - **Section (f) Fit Testing:**
    - Failure to perform appropriate fit test
  - **Section (h) Maintenance and Care of Respirators:**
    - Failure to properly store respirator
  - **Section (k) Training and Information:**
    - Failure to ensure required employee knowledge:
      - Why the respirator is necessary;
      - The importance of proper fit, use and maintenance;
      - The limitations and capabilities of the respirator;
      - How to use the respirator in emergency situations; etc.
  - **Section (m) Medical Evaluation:**
    - Failure to maintain fit test records.
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- [Understanding Compliance with OSHA's Respiratory Protection Standard During COVID-19 Pandemic](#)

# The General Duty Clause

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- Required elements of GDC violation
  - Employee exposure to a hazard
  - Alleged hazard must be recognized (by employer or employer's industry)
  - Employer knowledge of presence of hazard (actual or constructive)
  - Alleged hazard caused or was likely to cause death or serious physical harm
  - A feasible method exists to correct the alleged hazard

# The General Duty Clause



- Sources of “Requirements” (Abatement Measures) Enforced Under GDC
  - *OSHA Guidance on Preparing Workplaces for COVID-19* (<https://www.osha.gov/Publications/OSHA3990.pdf> )
  - CDC and OSHA jointly issued the *Meat and Poultry Processing Workers and Employers, Interim Guidance* (<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>)
  - Others address medical removal, contact tracing, return to work, etc.
  - Became sources for state ETS

- Triggering PPE, respiratory protection and GDC requirements
- Measures (“tips”) that can help reduce the risk of exposure to the coronavirus:
  - Ensure all HVAC systems are fully functional
  - Remove or redirect personal fans to prevent blowing air from one worker to another.
  - Use HVAC system filters with a Minimum Efficiency Reporting Value (MERV) rating of 13 or higher, where feasible.
  - Maximize intake of (clean) outside air to extent feasible.
    - HVAC system setting
    - Open windows or other sources of fresh air where possible.
    - Ensure exhaust air is not pulled back into the building from HVAC air intakes or open windows.
    - Avoid challenging temperatures, humidity issues, ambient pollution
  - Consider using portable HEPA fan/filtration systems in higher-risk areas.
  - When changing filters, wear appropriate personal protective equipment.
    - ASHRAE recommends N95 respirators, eye protection (safety glasses, goggles, or face shields), and disposable gloves.
  - Ensure exhaust fans in restrooms are fully functional, operating at maximum capacity, and set to remain on.



# General Duty Clause Case - Smithfield Meat Processing Plant



- Smithfield Packaged Meats Corp. in Sioux Falls, SD
  - March 9 – OSHA issues *Guidance for Preparing Workplaces for Coronavirus*
  - March 24, 2020 – S. Dakota Health Dept. notified of COVID-19 case involving plant worker and initiates investigation
  - April 11 – 369 cases confirmed among plant employees
  - April 12 – plant closed and CDC launched investigation
  - April 20 – OSHA opens inspection
  - April 23 – workers’ suit against Smithfield
  - April 26 -- OSHA issued COVID-19 Guidance for Meatpacking and Processing Industries – provided detailed guidance on engineering controls & work practices
  - June – OSHA issues subpoena to SD Health Dept for records provided by Smithfield
  - Aug 6 - CDC issued investigation report
  - Sep 9 - OSHA issued single GDC “serious” citation to Smithfield with “maximum penalty” of \$13,494, alleging: “**On or about and at times prior to March 23, 2020**, the employer did not develop or implement timely and effective measures to mitigate exposures to the hazard of SARS-CoV-2.”
  - Smithfield press statement – “the citation is wholly without merit and we plan to contest it”

- CDC report stated:
  - Close contact of employees working on production line in groups less than 6 feet apart until April 3 (date CDC issued mask rec.)
  - Close contact of employees in common areas (e.g., locker rooms and cafeterias) facilitated spread among employees in different departments
  - Installing physical barriers on production line (before plant closure) resulted in *decrease in transmission rate*

- Rural Community Workers sued Smithfield in federal court in Missouri for “not taking adequate steps to prevent transmission” of COVID-19
  - Court dismissed the case
  - Plaintiffs’ claimed company not complying with CDC/OSHA guidance, alleging:
    - Failure to maintain adequate distance
    - Prohibiting taking breaks to wash hands or face
    - Failure to implement sick leave policy that doesn’t penalize workers for missing work, even if for COVID-19
    - Failure to implement testing and contact tracing

- Was there employee exposure to a hazard? (first element of GDC citation)
  - “Between March 22, 2020, and June 16, 2020, approximately 1,294 [of the plant’s 3,635] employees had tested positive for SARS-CoV-2. Of those employees, approximately 43 were hospitalized and four employees died of complications related to the virus.”
    - But the plant closed April 12
  - Consider infection rate and percentage of infected people who die or suffer a serious irreversible condition
  - Presumably the infection rate in the plant significantly exceeded the rate in the surrounding communities.

- Was hazard recognized? (second element of GDC citation)
  - March 9 – OSHA issues *Guidance for Preparing Workplaces for Coronavirus*
  - March 13 – President Trump Declares National Emergency
  - March 24, 2020 – S. Dakota Health Department notified of COVID-19 case involving plant worker and began investigation
  - April 3 – Missouri stay at home order & distancing mandate; CDC issued rec. for broad use of cloth masks
  - April 9 – CDC Interim Guidance for Businesses to Plan and Respond to Coronavirus
  - April 11 – 369 cases confirmed among plant employees
  - April 12 – plant closed and CDC launched investigation
  - April 20 – OSHA opens inspection
  - April 23 – workers' suit against Smithfield alleging several plants with outbreaks
  - April 26 -- OSHA issued COVID-19 Guidance for Meatpacking and Processing Industries – provided detailed guidance on engineering controls & work practices
  - Aug 6 - CDC issued investigation report
  - Sep 9 – OSHA citation for events prior to or about March 23
  - Contrast with OSHA Bloodborne Pathogen Standard – fluids with human blood presumed to carry pathogen

- Was Smithfield aware of the hazard? (third element of GDC citation)
  - Actual or constructive knowledge based on due diligence, industry knowledge
  - Seems like this analysis would be similar to whether the hazard was recognized

- Did the hazard cause or was it likely to cause death or serious physical harm? (fourth element of GDC citation)
  - Infection rate
    - 35.6% of employees at the facility contracted COVID-19 (1,294 out of 3,635 employees– but many well after the plant closed)
    - 10.7% of South Dakota residents who have been tested have tested positive
  - Hospitalization rate
    - 48 of the 3,635 employees were hospitalized for COVID-19 (roughly 1.3%)
    - 0.15% of all SD residents were hospitalized for COVID-19
  - Fatalities (and rate)
    - 4 of the 3,635 employees at the plant died from COVID-19 (0.3%)

# General Duty Clause Case - Smithfield Meat Processing Plant

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- Was there a feasible means of abatement? (fifth element of GDC case)
  - OSHA and CDC guidance recommended a broad range of control measures.
  - A significant portion of them are clearly feasible and presumably there is sufficient scientific evidence to validate their use.
- Likely to provide precedent on when hazard is recognized
- By the time the case is finally resolved by the Review Commission and the courts, it is likely that widespread vaccination or herd immunity will effectively control the hazard



- Virginia ETS
- Michigan ETS
- Oregon ETS
- California ETS to supplement Infectious Disease Standard

# State Plans with Infectious Disease Standards or ETS



- Overall infection control plan – site specific
- Hazard assessment -- identifying workplace tasks, conditions and practices; screening employees
- Hazard control measures
  - Engineering Controls: screening tools, barriers, ventilation (max fresh air, MERV 13 filters), face covering
  - Work practices: physical distancing, screening, medical removal
  - PPE: gloves, face shields, respiratory protection
- Training and communication of information to employees about COVID-19 program, hazards, control measures to prevent and minimize, testing, symptoms, reporting
- System for employees to report exposures without fear of retaliation.
- System for investigating and responding to cases in the workplace, exposure notification, free testing for workers who may have been exposed.
- Medical removal of COVID-19 positive workers (and exposed workers) from the workplace with measures to protect pay and benefits, and criteria for employees to return to work after recovering from COVID-19.
- Monitoring performance and correcting COVID-19 hazards.
- Positive COVID-19 case and illness recording and reporting requirements.
- Requirements for testing and notifying public health departments of workplace outbreaks (three or more cases in a workplace in a 14-day period) and major outbreaks (20 or more cases within a 30-day period).

- Employers must record cases of COVID-19 if meet 3 criteria:
  - Confirmed case, as defined by the CDC;
  - Work related as defined by 29 CFR § 1904.5; and
  - Involves one or more of the general recording criteria set forth in 29 CFR § 1904.7

Source: OSHA May 19, 2020 Enforcement Memo - *Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)*

## Laboratory Criteria:

- Laboratory evidence using a method approved or authorized by the U.S. Food and Drug Administration (FDA) or designated authority:
  - *Confirmatory laboratory evidence:* Detection of severe acute respiratory syndrome coronavirus 2 ribonucleic acid (SARS-CoV-2 RNA) in a clinical specimen using a molecular amplification detection test
  - *Presumptive laboratory evidence:* Detection of specific antigen in a clinical specimen
  - Detection of specific antibody in serum, plasma, or whole blood indicative of a new or recent infection\*

*\*Serologic methods for diagnosis are currently being defined.*

# Recording – Must be “Work-Related”



## ■ 1904.5 - Determination of Work-Relatedness

### • 1904.5(a):

- An injury or illness is work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness
- A work-related exposure in the work environment generally would include interaction with people known to be infected with SARS-CoV-2; working in the same area where people known to have been carrying SARS-CoV-2 had been; or sharing tools, materials or vehicles with persons known to have been carrying SARS-CoV-2.
- It appears Cal-OSHA takes the position that “a known exposure ... would trigger the presumption of work-relatedness.”

### • 1904.5(b)(7):

- Injuries and illnesses that occur while an employee is working at home, including work in a home office, will be considered work-related if the injury or illness occurs while the employee is performing work for pay or compensation in the home, AND the injury or illness is directly related to the performance of work rather than to the general home environment or setting

<https://www.osha.gov/laws-regs/regulations/standardnumber/1904/1904.5>

- **1904.7- General Recording Criteria**

- **1904.7(a):**

- You must consider an injury or illness to meet the general recording criteria, and therefore to be recordable, if it results in any of the following:

- death,
- days away from work,
- restricted work or transfer to another job,
- medical treatment beyond first aid,
- loss of consciousness, or
- a significant injury or illness diagnosed by a physician or other licensed health care professional
  - OSHA's position is that a COVID-19 infection falls in this category

- **1904.39 - Reporting Fatality, Injury and Illness Information to OSHA**
  - An employer must report the work-related death of its employee within 8 hours after the death of any employee but only if the fatality occurs within 30 days of the work-related incident.
  - An employer must report the work-related hospitalization of its employee within 24 hours but only if the in-patient hospitalization occurs within 24 hours of the work-related incident.
    - For cases of COVID-19, the term "incident" means an exposure to SARS-CoV-2 in the workplace.
    - Therefore, in order to be reportable, an in-patient hospitalization due to COVID-19 must occur within 24 hours of an exposure to SARS-CoV-2 at work.

# Election Impact – Biden Administration



- Biden campaign indicated a commitment to the adoption of an OSHA COVID standard for first-line personnel
- Very possible Biden Admin. will propose a nationwide ETS
- Former OSHA Administrator David Michaels added to Biden's COVID-19 Task Force:
  - Michaels: “This is far and away the most significant worker safety crisis in OSHA’s history, and OSHA has failed.” “[OSHA] should be cranking out citations in a very public way, and in a way that’s most impactful.”
- Report issued by Michaels in October states:
  - “The single most important action the Department of Labor can take to help stop this pandemic, save lives, and safely reopen the economy is for OSHA to issue an Emergency Temporary Standard (ETS)”



# What Should Employers Do



- Employers under OSHA jurisdiction should:
  - Implement CDC and OSHA guidance to the extent feasible and provides meaningful risk reduction
  - Follow any applicable state requirements
  - Consider implementing elements from state plan rules that would provide meaningful risk reduction
  - Prepare for likelihood of OSHA ETS
- Employers under state plans with infectious disease or COVID-ETS
  - Follow any applicable state requirements
  - Consider implementing additional elements from CDC and OSHA guidance or other state plans
  - Prepare for likelihood of OSHA ETS, which could impose additional requirements
- All Employers
  - Maximize transparency and communication with employees
  - Monitor evolving guidance (e.g., masks, benefits of masks, close contact) and science
  - Tailor program and employee protections to site operations and personnel
  - Ideally, should be a COVID-19 program coordinator on site during all working hours
  - Continuously audit program and update as necessary
  - History indicates that employers should consider including response to pandemics in the site-wide annual safety training and in emergency response training
  - Participate in OSHA's upcoming emergency response rulemaking, which could be expanded to address pandemics



# THANK YOU

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