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BREAKING: OSHA Issues Enforcement Policy Relaxing Regulatory Compliance During the COVID-19 Crisis

The Coronavirus pandemic has created unprecedented challenges for employers that are attempting to meet OSHA regulatory obligations – such as annual training, auditing, testing, medical surveillance requirements, and the like – without creating greater risk of exposure to COVID-19 for their employees. This evening (April 16, 2020), OSHA issued a [new Enforcement Memorandum](#) acknowledging that reality. The enforcement memo, entitled “[Discretion in Enforcement when Considering an Employer’s Good Faith Efforts During the Coronavirus Disease 2019 \(COVID-19\) Pandemic](#),” provides enforcement relief for employers who exercise good faith in the context of this extraordinary health crisis.

In explaining the need for this enforcement relief, OSHA recognized that:

“Widespread business closures, restrictions on travel, limitations on group sizes, facility visitor prohibitions, and stay-at-home or shelter-in-place requirements” have strained the “availability of employees, consultants, or contractors who normally provide training, auditing, equipment inspections, testing, and other essential safety and industrial hygiene services,” as well as the opportunity for “employee participation in training even when trainers are available.” Similarly, “access to medical testing facilities may be limited or suspended.”

To address these very real challenges to achieving full compliance with various annual and other regulatory requirements, OSHA issued a temporary enforcement policy based on the agency’s enforcement discretion to relax enforcement of many existing regulatory obligations if complying with these obligations is not feasible or if doing so would pose an unreasonable risk of virus transmission among the employer’s workforce. Today’s enforcement policy applies broadly to employers in all industry sectors, takes effect immediately, and will remain in effect indefinitely throughout the current public health crisis.



The heart of the new enforcement policy is this:

- Where an employer is unable to comply with OSHA standards that require annual or recurring audits, reviews, training, assessments, inspections, or testing because of the Coronavirus pandemic, AND the employer has made good faith attempts to comply, OSHA “shall take such efforts into strong consideration in determining whether to cite a violation.”
- But where the employer cannot demonstrate any efforts to comply or why trying to comply would be more hazardous, a citation may issue as appropriate.

As part of OSHA's assessment whether an employer engaged in good faith compliance efforts, OSHA will evaluate whether the employer explored other options to comply with the applicable standards (e.g., by remote training, virtual inspections, etc.), and will look for any efforts to implement interim alternative protections. OSHA will be looking for documentation and other evidence of the employer's efforts to comply or for the reasons that compliance would have created an unreasonable risk of exposure to employees. Such documentation may include contracts or invoices showing that the training or auditing service had been timely scheduled before the COVID-19 outbreak, and communications with the providers about the cancellation because of the pandemic.

OSHA will also expect to see that the employer demonstrated further good faith attempts to return to compliance as soon as possible following the re-opening of the workplace, renewed availability of third party services, and/or the relaxing of the various social distancing related policies. Indeed, the enforcement memo expressly provides for a program for OSHA to conduct monitoring inspections once normal activities resume at a random sampling of worksites where citation were not issued, in order to ensure the employers have returned to full compliance.

What types of compliance obligations are covered by this enforcement policy?

A clear example of this type of compliance challenge is annual audiometric testing. Typically, employers contract with a third party service to bring on-site at the employer's workplace a mobile audiometric testing facility. But due to travel restrictions or social distancing protocols (i.e., not running numerous employees through a cramped space to be tested on a common piece of equipment), the employer or the third party provider cancel the visit. Indeed, the Council for Accreditation in Occupational Hearing Conservation issued a [recommendation](#) that audiometric evaluations be suspended to minimize the risk to workers and conserve PPE. In this circumstance, OSHA will not cite the employer for failing to timely conduct annual audiograms. To enhance the likelihood OSHA will exercise that enforcement discretion, employers should be prepared to demonstrate that it considered alternative options for compliance, implemented interim alternative protective measures (e.g., enhanced enforcement of hearing protection requirements), and has taken steps to reschedule the mobile facility as soon as possible after the health crisis.

To further clarify the types of regulatory requirements that OSHA is relaxing by way of this guidance, the memo includes an Annex that lists "***Examples of Situations Where Enforcement Discretion Should be Considered,***" which includes:

1. Annual Audiograms
2. Process Safety Management Requirements such as:
 - Process Hazard Analysis Revalidations (on a five-year cycle)
 - Annual review and certification of Operating Procedures
 - Periodic Refresher Operator Training
3. Annual Hazardous Waste Operations Training
4. Annual Respirator Fit Testing and Training
5. Periodic Maritime Crane Testing and Certification
6. Construction Crane Operator Re-Certification or Re-Licensing Examinations
7. Periodic Medical Evaluation for Respirator Use

This list is intended to be illustrative, not exhaustive. We could see similar requirements like periodic powered industrial truck training or medical surveillance requirements covered by the same principles espoused by this policy.

Similar Guidance from EPA

OSHA's policy comes a few weeks after EPA issued similar guidance about enforcement discretion during the Coronavirus pandemic. On March 26, 2020, EPA published a temporary [enforcement memorandum](#), stating that it will exercise enforcement discretion for certain types of noncompliance caused by the COVID-19 outbreak, if regulated entities take appropriate steps applicable to their situations. EPA specifically sets forth its expectations for appropriate steps that regulated entities should take, as well as the agency's expected enforcement response, based on the type of noncompliance. In general, all EPA enforcement discretion is conditioned on the following:

1. Entities should make every effort to comply with their environmental compliance obligations.
2. If compliance is not reasonably practicable, facilities with environmental compliance obligations should:
 - Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by coronavirus;
 - Identify the specific nature and dates of the noncompliance;
 - Identify how coronavirus was the cause of the noncompliance, and the decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance at the earliest opportunity;
 - Return to compliance as soon as possible; and
 - Document the information, action, or condition specified in the bullet points above.

EPA then specifies the types of noncompliance covered under its memorandum and the degree to which it would expect to enforce. For example, EPA states that it does not expect to seek penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations in situations where EPA agrees that Coronavirus was the cause of the noncompliance and the entity provides supporting documentation to EPA upon request. Additionally, EPA states that since many training classes are offered online, sectors mandated to function with certified operators should maintain normal certification and training practices, but if this is not practical due to the pandemic, it is more important to keep experienced, trained operators on the job, even if a training or certification is missed.

For additional employer resources on issues related to COVID-19, please visit [Conn Maciel Carey's COVID-19 FAQ Page](#) for an extensive index of frequently asked questions about HR, employment law, and OSHA regulatory developments and guidance. Likewise, subscribe to our [Employer Defense Report](#) blog and [OSHA Defense Report](#) blog for regular updates about COVID-19 and other



important Labor & Employment and OSHA issues. Conn Maciel Carey's COVID-19 Task Force is monitoring federal, state, and local developments closely and is regularly updating these resources with the latest news and resources for employers.

Eric J. Conn

Chair, OSHA • Workplace Safety Practice Group

Conn Maciel Carey LLP

202-909-2737

econn@connmaciel.com

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