

Enforcement Memos

/ Discretion in Enforcement when Considering an Employer's Good Faith Efforts During the Coronavirus Disease 2019 (COVID-19) Pandemic

April 16, 2020

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
STATE PLAN DESIGNEES

THROUGH: AMANDA EDENS
Deputy Assistant Secretary

FROM: PATRICK J. KAPUST, Acting Director
Directorate of Enforcement Programs

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SUBJECT: Discretion in Enforcement when Considering an Employer's Good Faith Efforts
During the Coronavirus Disease 2019 (COVID-19) Pandemic

In light of the coronavirus disease 2019 (COVID-19) pandemic, OSHA understands that some employers may face difficulties complying with OSHA standards due to the ongoing health emergency. Widespread business closures, restrictions on travel, limitations on group sizes, facility visitor prohibitions, and stay-at-home or shelter-in-place requirements may limit the availability of employees, consultants, or contractors who normally provide training, auditing, equipment inspections, testing, and other essential safety and industrial hygiene services. Business closures and other restrictions and limitations may also preclude employee participation in training even when trainers are available. In other situations, access to medical testing facilities may be limited or suspended.

For example, the American College of Occupational and Environmental Medicine issued a recommendation that occupational spirometry testing be suspended because of concerns about spreading droplets containing the COVID-19 virus during spirometry maneuvers. In addition, the Council for Accreditation in Occupational Hearing Conservation issued a recommendation that audiometric evaluations be suspended until normal operations have resumed, in order to minimize the risk to healthcare workers and conserve personal protective equipment.

During the course of an inspection, OSHA Area Offices will assess an employer's efforts to comply with standards that require annual or recurring audits, reviews, training, or assessments (see Annex below for some examples). Compliance Safety and Health Officers (CSHOs) should evaluate whether the employer made good faith efforts to comply with applicable OSHA standards and, in situations where compliance was not possible, to ensure that employees were not exposed to hazards from tasks, processes, or equipment for which they were not prepared or trained. As part of assessing whether an employer engaged in good faith compliance efforts, CSHOs should evaluate whether the employer thoroughly explored all options to comply with the applicable standard(s) (e.g., the use of virtual training or remote communication strategies). CSHOs should also consider any interim alternative protections implemented or provided to protect employees, such as engineering or administrative controls, and whether the employer took steps to reschedule the required annual activity as soon as possible.

In instances where an employer is unable to comply with OSHA-mandated training, audit, assessment, inspection, or testing requirements because local authorities required the workplace to close, the employer should demonstrate a good faith attempt to meet the applicable requirements as soon as possible following the re-opening of the workplace.

Where the employer cannot demonstrate any efforts to comply, a citation may be issued as appropriate under existing enforcement policy. However, where an employer has made attempts to comply in good faith, Area Offices shall take such efforts into strong consideration in determining whether to cite a violation. Where enforcement discretion is warranted, Area Offices will ensure that sufficient documentation (e.g., notes on the efforts the employer made to comply, letters or other documentation showing that providers had closed) is provided in the case file to support the decision.

In order to ensure that corrective actions have been taken once normal activities resume, OSHA will develop a program to conduct monitoring inspections from a randomized sampling of cases where violations were noted but not cited. To accommodate this, CSHOs shall enter the code N-10-ABATEMENT DEFERRED in the OSHA Information System to denote such cases. Additional guidance on monitoring will be provided at a later date.

This memorandum will take effect immediately and remain in effect until further notice. This guidance is intended to be time-limited to the current public health crisis. Please frequently check OSHA's webpage at www.osha.gov/coronavirus for updates.

cc: DCSP
DTSEM
DSG

[Correction 4/22/2020]

Annex

Examples of Situations Where Enforcement Discretion Should be Considered

(Note: Some standards referenced may be applicable to multiple industries.)

Annual Audiograms

An employer contracts with a service that provides a mobile audiometric testing facility. The service was scheduled to arrive at the employer's facility on March 27, 2020, but due to on-site visitor restrictions and social distancing protocols, the employer cancelled the arrival of the mobile facility. OSHA will not cite the employer for failing to conduct annual audiograms, provided the employer considered alternative options for compliance, implemented interim alternative protective measures, where possible, and shows a good faith effort to reschedule the mobile facility as soon as possible.

[Annual] Process Safety Management Requirements (Process Hazard Analysis (PHA) Revalidation, Review of Operating Procedures, and Refresher Training)

An employer contracts with a consultant to conduct process hazard analysis (PHA) revalidations. A PHA revalidation for the employer's ammonia refrigeration process was due to be completed by April 1, 2020, but because of travel restrictions and shelter-in-place orders, the consultant was unable to fly to the employer's location. OSHA will not cite the employer for failing to meet the [~~three-year~~ five-year] requirement for conducting a PHA revalidation, provided the employer considered alternative options for compliance, implemented interim alternative protective measures, where possible, and shows a good faith effort to reschedule the PHA revalidation as soon as the travel restrictions and shelter-in-place orders are lifted.

Hazardous Waste Operations Training

An employer operating a site where there is potential for the release of hazardous materials uses a contractor

for emergency response and containment. That same contractor also conducts training for all employees working on site that may be exposed to hazardous substances during a release. The annual training was scheduled to take place at the end of March 2020, but was cancelled due to the plant shutdown following state and local mandates. OSHA will not cite the employer for failing to conduct the annual refresher training, provided the employer shows a good faith effort to reschedule the training as soon as the shutdown has been lifted.

Respirator Fit Testing and Training

As part of an employer's manufacturing operations, employees use spray booths to apply a finishing coat to products, requiring the use of respirators. The employer scheduled annual refresher training for April 1, 2020, but the consultant was unable to conduct the training because of travel restrictions. OSHA will not cite the employer for failing to conduct the annual refresher training, provided that the employer considered alternative options for compliance; implemented interim alternative protective measures, where possible; and shows a good faith effort to reschedule the training as soon as the restrictions are lifted. (For more information refer to OSHA's April 3, 2020 memorandum, Enforcement Guidance for Respiratory Protection and the N95 Shortage Due to the Coronavirus Disease 2019 (COVID-19) Pandemic. For specific guidance related to healthcare workers, see OSHA's March 14, 2020 memorandum, Temporary Enforcement Guidance - Healthcare Respiratory Protection Annual Fit-Testing for N95 Filtering Facepieces During the COVID-19 Outbreak.)

Maritime Crane Testing and Certification

An employer contacts an OSHA Accredited Cargo Gear Company to have the employer's cargo gear inspected and certified because its OSHA 71 certificate is about to expire. The inspection is scheduled to take place at the employer's facility, but due to travel restrictions, on-site visitor constraints, and social distancing protocols, the inspection cannot take place. OSHA will not cite the employer for not having current cargo gear accreditation certificates (OSHA 71s), provided the employer considered alternative options for compliance, implemented interim alternative protective measures, where possible, and shows a good faith effort to reschedule the cargo gear inspection as soon as possible.

Construction Crane Operator Certification

An operator certified in accordance with 29 CFR 1926 Subpart CC (Cranes and Derricks) is unable to undergo a re-certification or re-licensing examination due to travel restrictions or social distancing protocols. OSHA will not cite the operator's employer for allowing the operator to work with an expired certification as long as the employer considered alternative options for compliance, implemented interim alternative protective measures, where possible, and can show good faith in its effort to reschedule and complete the operator's recertification as soon as possible through a certification or licensing body that meets the requirements of OSHA's standard.

Medical Evaluation

Along with engineering controls, an employer operating a plywood manufacturing facility provides employees with respirators to prevent exposure to formaldehyde. In order to conduct a medical evaluation to determine if employees are cleared to wear respirators, the employer contracts with medical professionals to conduct pulmonary function testing, or spirometry. However, because of the American College of Occupational and Environmental Medicine's recommendation, such testing is suspended. OSHA will not cite the employer for failing to conduct the periodic [medical] monitoring if the employer implemented interim alternative protective measures, where possible, and shows a good faith effort to reschedule the spirometry testing once the suspension is lifted.

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