

## **OSHA National Emphasis Program (NEP) on COVID-19**

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It seems like the news about OSHA's actions concerning COVID – 19 are coming at a rapid pace. To recap, on January 21 President Biden issued an Executive Order directing OSHA to issue guidance with regards to workplace steps for employers to take to protect employees from COVID – 19. On January 29 OSHA issued an updated guidance document listing 16 steps for employers to take to protect their employees. Last week, we received questions from some association members inquiring with regards to the impact of state governments' decisions to "reopen" entirely on OSHA's enforcement activities. Last Friday, March 12, OSHA issued a National Emphasis Program (NEP) on COVID – 19. The NEP is slated to go into effect on March 18 and remains in effect until further notice. As a result, this will be the second bulletin on COVID-19 in less than a week to address questions on COVID -10.

The NEP may not be the last action taken by OSHA concerning COVID – 19 since President Biden's January 21 Executive Order also directed OSHA to consider an emergency temporary standard (ETS) by March 15. As of the preparation of this bulletin, OSHA has not announced its intention to issue an ETS. For now, employers need to be aware of the NEP and the fact that it, among other things, provides OSHA probable cause to conduct workplace inspections concerning steps taken by employers to protect employees from COVID – 19.

For those of you who do not know, an NEP is a temporary enforcement initiative by OSHA. It is intended to focus resources on specific hazards and/or high hazard industries. In this case the NEP will focus OSHA's attention and resources on the COVID-19 hazard and steps taken by employers to protect their employees from COVID – 19. OSHA is not requiring state plan states to adopt the COVID – 19 NEP but they are strongly encouraging states to do so. OSHA has issued a requirement that state plan states notify OSHA by May 11 as to whether or not they will adopt the NEP, whether they already have a substantially similar policy in place, intend to adopt new policies and procedures or do not intend to adopt this Direction creating the NEP.

The NEP is thirty-five pages long so I will attempt in this bulletin to distill the key points of the NEP for your attention. The Direction creating the NEP will remain effective for no more than 12 months from its effective date unless it is canceled or extended by a superseding directive. As stated in the Direction of establishing the NEP: "This NEP enhances OSHA's emphasis on COVID – 19 related hazards by formalizing components for planned/programmed and follow-up inspections in work places where employees have a high frequency of close contact exposures and where this hazard is prevalent." Also contained in the goal for the NEP is OSHA's stated goal that "in each Region, the goal of this NEP is to continue performing a high percentage of COVID – 19 inspections (at least 5%) of the Regions total assigned inspection goal (which is approximately 1600 inspections OSHA – wide),..." Many decisions regarding COVID-19

inspections will be made from reviews of the OSHA 300A forms filed electronically each year.

The NEP also states that for programmed inspections the NEP will generate two Master Lists for site selection. Many of our member companies are covered by Master list number 2. These are companies that have a North American Industry Classification System (NAICS) and have been identified by OSHA using calendar year 2020 form 300A data to identify establishments with elevated rates of illness. The NEP also states that Area Directors may use discretion in scheduling an inspection at previously cited establishments, which were inspected within the previous 12 months even though other than serious citations, Hazard Alert Letters or Notification Letters were issued related to exposure to SARS – COV – 2 as a result of a previous inspection. Also, Area Offices may add establishments to the generated Master lists based on information from appropriate sources which includes local knowledge of establishments, commercial directories and referrals from local health departments.

Master list Number 2 is found in Appendix B of the NEP which identifies Secondary Target Industries for the COVID – 19 NEP. Some of the industries identified in Appendix B include:

- Construction of Buildings
- Heavy and Civil Engineering Construction
- Specialty Trained Contractors
- Wood Product Manufacturing
- Nonmetallic Mineral Product Manufacturing
- Chemical Manufacturing
- Asphalt Paving, Roofing, and Saturated Materials Manufacturing

As you can see many of the industries which comprise our membership are listed in appendix B of the NEP.

Finally, there is a section of the NEP which addresses whistleblower protection. Here the NEP refers back to President Biden's Executive Order on Protecting Worker Health and Safety of January 21, 2021. A portion of this Executive Order directs OSHA to focus its enforcement efforts related to COVID – 19 on employers that engage in retaliation against employees who "complain about unsafe or unhealthful conditions or exercise other rights under the Act." Further OSHA states that "this NEP will include added focus of ensuring that workers are protected from retaliation through information sharing and prompt referrals."

The preceding is a brief summary of a thirty-five page National Emphasis Program. As a member of this Association we feel it is important that you become aware as soon as possible of the steps being taken by OSHA to address concerns centering around COVID – 19. The important take away from the establishment of the

NEP is that OSHA is moving forward to develop enforcement protocols for COVID-19. If you are an employer who has been delaying the development of your COVID-19 employee protection plan the NEP is a sign that it is time to move forward to get your program established. It will be interesting to see how OSHA's efforts on COVID-19 continue as more states may "open up" – stay tuned.