

Insights: Alerts

COVID-19: Changes to OSHA Investigation and Enforcement Policies and EEOC Suspends Right to Sue Notice Deadlines

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main [COVID-19 Task Force page](#) and/or your email for updates.

As state and federal agencies continue to respond to the evolving COVID-19 public health crisis, the Occupational Safety and Health Administration (OSHA) and the U.S. Equal Employment Opportunity Commission (EEOC) have recently revised their investigation and enforcement policies to address the growing concerns with how employers will maintain a healthy work environment and how the administrations will continue to effectively serve the public during this pandemic.

On April 10, 2020, OSHA issued temporary enforcement guidance that now limits employer reporting obligations, under its Recording and Reporting Occupational Injuries and Illness rule, to instances where the case 1) is a confirmed case of COVID-19; 2) is work-related; and 3) involves one or more of the general recording criteria set forth under the rule (e.g. death). Additionally, with the exception of employers in the healthcare industry, emergency response organizations, and correction institutions, OSHA will not require other employers to make work-relatedness determinations, except where there is objective evidence that the COVID-19 case may be work-related (e.g. multiple cases developing among workers who work closely together); and the evidence was reasonably available to the employer. OSHA's record keeping and reporting regulations ordinarily require employers with more than 10 employees to keep a record of all serious work-related injuries and illnesses. While the regulations would qualify COVID-19 as a recordable illness, the temporary enforcement guidance is meant to account for the difficulties in making determinations about whether workers contracted the virus due to exposures at work and to help employers focus their response efforts on implementing good hygiene practices in their workplaces.

A few days later, on April 13, 2020, OSHA also issued an Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19) to provide instructions and guidance for handling COVID-19 related complaints, referrals, and severe illness reports. The interim response plan instructs its Area Offices and compliance safety and health officers to prioritize fatalities and imminent danger exposures related to COVID-19 for inspections, with particular attention given to healthcare organizations and first responders. Towards this effort and to conserve enforcement resources, complaints from non-healthcare and non-emergency response

establishments and where employees are engaged in medium or lower exposure risk tasks, will be investigated using the “non-formal” investigation process, which does not require on-site inspections. Rather, investigation of the allegations will be referred to the employer, who is then responsible for implementing any necessary corrections or modifications. After the investigation, the employer must provide OSHA with the results and supporting documentation of the findings, including any measurement or monitoring results, any helpful photographs/ video, and a description of any corrective action taken. While OSHA's notification to the employer of the complaint is not a citation, an employer's failure to respond or inadequate investigation, may result in an on-site inspection. In instances where an employer reports a fatality, in-patient hospitalization, amputation, or loss of an eye, that was the result of a work-related incident, OSHA's Area Director will evaluate the risk level of exposure to COVID-19 at the workplace, and prioritize resources in coordination with regional offices to determine if an on-site inspection is necessary.

The EEOC also modified its policy related to the issuance of charge closure documents to ensure an individual's right to pursue claims during this unprecedented circumstance. Specifically, the EEOC has temporarily suspended issuing “right to sue” notices, which accompany the completion of investigations where the agency was unable to resolve the charge as part of the pre-suit conciliation process or where the agency was unable to determine whether there is reasonable cause to believe bias took place. Under the regulations, the complainant has 90 days to file suit after receiving the right to sue notice. Now, the agency will not issue the letter, unless specifically requested by the complainant, effectively tolling the time an aggrieved worker has to file suit. The revisions undertaken by the EEOC hope to alleviate any hesitations or concerns an individual may have in pursuing a lawful claim because of the constraints COVID-19 has presented on the legal system. For employers, this means that potential lawsuits may not occur until well into the future and they should keep this in mind while maintaining records and assessing litigation risks. The agency's revised process was confirmed in an emailed statement by EEOC spokeswoman Kimberly Smith-Brown, on April 7, 2020, but has yet to be made “official” and announced to the general public on its website.

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