

Client Alert: OSHA to Consider Employer Good Faith when Non-Compliance Results from COVID-19 (Coronavirus) or Restrictions Relating to COVID-19

20 Apr 2020

[David L. Kelleher](#)

On April 16, in a memorandum entitled *Discretion in Enforcement when Considering an Employer's Good Faith Efforts During the Coronavirus Disease 2019 (COVID-19) Pandemic*, the Occupational Safety and Health Administration acknowledged that COVID-19 and the workplace restrictions imposed in response to the virus may present significant difficulties for employer compliance with OSHA standards. Accordingly, OSHA outlined when during this coronavirus public health emergency documented good faith efforts to comply may suffice in lieu of strict compliance. A copy of the memorandum can be found [here](#) and at [osha.gov](#).

OSHA expressly recognized how restrictions on travel, limitations on group sizes, stay-at-home requests, facility visitor prohibitions and the like, may limit the availability of employees, consultants and contractors who normally provide training, audits, industrial hygiene and other services. These restrictions also may limit the ability of employees to participate in programs such as training when the trainers are available.

Neither the virus, nor the governmental and private responses, however, is a free pass for employers. OSHA specifically warns that where “the employer cannot demonstrate any efforts to comply, a citation may be issued as appropriate under existing enforcement policy.” In contrast, where employers make good faith efforts, OSHA “shall take such efforts into strong consideration in determining whether to cite a violation.”

Accordingly, when strict compliance with an OSHA standard is not possible because of this public health emergency, it is incumbent on employers – even when operating with reduced workforces – to document all efforts at compliance.

OSHA's *Interim Enforcement Response Plan*, released on April 13, available [here](#) and at [osha.gov](#), disclosed that complaints received by OSHA during the initial months of this public health emergency describe concerns related to a lack of personal protective equipment (PPE), such as respirators, gloves, and gowns, as well as a lack of training on appropriate standards regarding possible COVID-19 illnesses in the workplace.

Employers unable to meet their regulatory obligations in these or other areas should fully document all their compliance efforts. Employers should document the who, what, where, when and why. Who was the normal supplier/trainer and why was the normal supplier/trainer unable to perform? What efforts were made to identify an alternative supplier/trainer or to permit the normal supplier/trainer access to the facility? When were these efforts made? When were these efforts made again? What steps were taken, or plans made, to meet the regulatory obligations when travel and other restrictions are lessened?

OSHA's memorandum on discretion in enforcement and enforcement response plan demonstrate that if prudent infection control practices and good faith compliance efforts are made *and documented* by employers, then OSHA will give strong consideration to those efforts – but the burden rests with employers to document their efforts.

This summary is not intended to contain legal advice or to be an exhaustive review. If you have any questions regarding this article, please contact [David L. Kelleher](#) at Jackson & Campbell, P.C.

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TAGGED: COVID-19, OSHA, Discretion in Enforcement when Considering an Employer's Good Faith Efforts During the Coronavirus Disease 2019 (COVID-19) Pandemic, Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)