ORC HSE Analysis: OSHA's New National Emphasis Program for COVID-19

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On March 12, 2021, OSHA issued the much-anticipated National Emphasis Program (NEP) targeting enforcement for establishments at risk of exposure to COVID-19 in response to President Joe Biden's Executive Order on Protecting Worker Health and Safety of Jan. 21.

The second part of OSHA's response to the Executive Order will be an Emergency Temporary Standard.

Under the NEP, OSHA is targeting: 1) establishments where employees are at an increased risk for potential exposure to the COVID virus; and 2) establishments with the greatest number of employees at risk of exposure. The NEP also focuses on employer retaliation toward employees who complain about unsafe conditions under the agency's whistleblower program.

The directive applies across federal OSHA; while adoption of the NEP by state plan states is encouraged, it is not required. Although state plan states do not have to adopt the NEP, they have to notify OSHA within 60 days of their intent on adoption. Federal agencies subject to OSHA inspection with employees exposed to the COVID-19 hazard are also included in the NEP. Further, establishments with fewer than 10 employees are included in the NEP. The program will remain in effect for 12 months unless extended or canceled by OSHA.

From an inspection perspective, the NEP will dedicate at least 5% of OSHA's inspection resources – approximately 1,600 inspections – to combating employee exposure to the virus. Follow-up inspections will be included in the NEP strategy; however, the criteria were not clearly spelled out. Establishment selection and targeting for inspection are based on industries listed in Appendices A and B of the directive.

Under the NEP, OSHA will generate two Master Lists. Master List 1 will include companies with North American Industry Classification System (NAICS) codes[1] included in Appendices A and B of the directive. Master List 2 will include establishments also having NAICS codes listed in Appendices A and B, but also having an elevated illness rate as indicated by OSHA Form 300 data. OSHA Area Offices can use either Master List 1 or 2, or a combination of both lists to create their inspection targeting goals.

Appendix A of the NEP includes two tables. Table 1 is for targeted industries in healthcare and Table 2 is for targeted industries for non-healthcare. Both tables are derived from enforcement

[1] https://www.census.gov/NAICS/

data including complaints, fatality/catastrophes, referrals, inspections, COVID-19-related violations, hazard alert letters, and calculations of where the greatest number of employees are expected to do work with potential exposure to COVID-19.
Appendix B contains NAICS codes for industries where employees have the highest frequency of close contact exposures with both the public and/or co-workers. The NAICS list in Appendix B was generated by both the Cybersecurity & Infrastructure Security Agency (CISA) and the Centers for Disease Control (CDC) Advisory Committee on Immunization Practices (ACIP). Inspection targeting lists under the NEP will be randomized. OSHA Area Offices under the NEP also have the authority to add establishments to the list based upon information from appropriate sources including local establishment knowledge, commercial directories, and referrals from the local health department.

Normally, prior to launching an NEP, OSHA would conduct 90 days of outreach. For this NEP, OSHA is waiving this requirement as it has determined that outreach and guidance has already been provided over the last year. OSHA will, however, continue to provide outreach during the course of the NEP.

The directive surprisingly did not spell out what OSHA will hold employers accountable for under the NEP. However, OSHA also issued revised enforcement guidance on March 12, outlining what the agency will be pursing under the NEP. Under this enforcement guide, OSHA will focus on:

- 29 CFR Part 1904, recording and reporting occupational injuries and illnesses;
- 29 CFR 1910.132 – general requirements – personal protective equipment;
- 29 CFR 1910.134 – respiratory protection;
- 29 CFR 1910.141 – sanitation;
- 29 CFR 1910.1020 – access to employee exposure and medical records;
- 29 CFR 1910.145 - Specification for accident prevention signs and tags;
- 29 CFR 1910.1030 – bloodborne pathogens[2]; and
- Section 5(a)(1) of the OSH Act – the General Duty Clause.

The General Duty Clause is a key element of this list. OSHA will, under the General Duty Clause, expect employers to develop and implement an exposure (infection) control plan (ECP) where there is risk of employee exposure. Depending on the level of risk, the plan can be simple or expansive.

The first step in developing an ECP is to determine your level of risk, which will determine where your establishment stands with regard to the NEP. You can refer to Appendices A and B of the NEP and determine if your establishment has been identified through your industry NAICS Code as high

[2] OSHA has determined that this standard may offer a framework that may help control some sources of the virus including exposure to body fluids.

risk by OSHA and therefore subject to potential inspection. If your industry group is covered in Appendices A and B, you should develop an ECP and examine your compliance with the above listed standards. If your NAICS Code is not included in Appendices A and B, your establishment could still be subject to inspection and an ECP should be considered. The scope of the ECP for a lower-risk facility can be less comprehensive than for a high-risk facility, but you will need to carefully assess the risk to determine the scope of the ECP. You can refer to the risk guidance document provided by OSHA.

As part of the risk assessment, facilities should first determine if there any cases previously or currently in the facility, regardless of where they originated. If there are cases, ascertain whether there are any clusters in the facility. As a second step, check with the city, county, and/or state health departments to look at the number of cases as well as the number of deaths in your city or county. This will help in determining the general risk in the community. Finally, check with the city, county, and state health departments to see what they are recommending for businesses in your area.

If you have contractors on site, look at their plans and programs to ensure that their programs are compliant with your program and procedures.

Once the risk assessment has been completed and your level of risk determined, develop an ECP based upon the risk level. For example, ECPs for low-risk establishments may include social distancing, medical questionnaires, employee training, setting up of barriers, PPE, and so forth. Again, the scope of the ECP depends on the risk level. OSHA's tuberculosis (TB) directive can provide helpful guidance. While the TB directive focuses on five industries where the risk of TB exposure is high based on CDC guidelines, it provides some solid guidance.

In developing an ECP, you can refer to a joint CDC and OSHA guidance document for manufacturing workers and employers issued last May. Regardless of the scope of your risk level, you should determine which of the following points should be included in the program:

- Assessing the potential exposure and level of exposure risk to employees based upon their work, occupation, and activities for communicable and infectious agents that are present or can reasonably be anticipated to be present;
- Assigning a coordinator for overseeing the ECP;
- On-site screening (temperature checks, questionnaires);
- Developing precautions based upon the level of risk, particularly the use of the Hierarchy of Controls (engineering, work practice, and PPE controls);
- Identification and isolation of any infectious cases;
- Safe distancing;
- Testing for COVID and vaccinations;

- Management of healthcare workers' risks of exposure to infected persons, including post-exposure prophylaxis;
- Work restrictions for exposed or infected healthcare personnel;
- Highlighting and referencing existing OSHA standards, including:
    - Bloodborne pathogens (1910.1030),
    - Respiratory protection (1910.134),
    - Personal protective equipment (1910.132),
    - Housekeeping and warning signs (1910.141),
    - Specification for accident prevention signs and tags (1910.145), and
    - Section 5(a)(1) of the OSH Act – the general duty clause.
- Procedures to provide information and training to managers and employees about potential or actual occupational exposure to communicable and infectious agents and the elements of the ECP;
- Procedures for reporting an incident;
- Medical surveillance procedures to identify suspected or confirmed cases of a communicable or infectious disease and a plan to isolate or transfer individuals; and
- Recordkeeping and recording of an illness.

Depending on the level of risk at the worksite, some or all of these provisions will need to be in place in order to avoid a General Duty Clause citation by OSHA. One should also periodically review the CDC and OSHA guidelines for any additional recommendations.