

OSHA FIELDS OVER 5,500 COVID-19 RELATED EMPLOYEE COMPLAINTS AND REFERRALS WHILE STATE PROGRAMS RECEIVE 12,500, AND THE NUMBERS CONTINUE TO CLIMB

Hodgson Russ OSHA Alert
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The Occupational Safety and Health Administration (OSHA) publishes data showing the daily increases in the aggregate complaint, referral, and inspection counts of COVID-19-related cases. The counts in the tables are based on compliance and enforcement activities coded with OSHA's special "N-16-COVID-19" inspection code, which according to OSHA's previously-issued interim COVID-19 enforcement plan guidance, is to be used for tracking and programming review. All activities that have a COVID-19 component will bear this coding, but the enforcement activities during an inspection are not necessarily limited solely to COVID-19 concerns. The data make quite clear that employee complaints are, by far, the number one trigger for OSHA involvement in COVID-19 safety matters.

According to the data tables, federal OSHA fielded 4,872 complaints and 656 referrals between February 1, 2020 and June 7, 2020 (the "Period").^[1] The complaints to OSHA during the Period were heavily skewed toward the Healthcare industry (1,453), with specific tallies reported for Retail Trade (540), Grocery Stores (93), Construction (163), General Warehousing and Storage (89), Restaurants and Other Eating Facilities (134), and Automotive Repair (31).

OSHA Region 5 (Indiana, Illinois, Minnesota, Wisconsin, Michigan, and Ohio) saw the highest number of total complaints and referrals with 1,155, followed closely by Region 1 (Connecticut, Massachusetts, Maine, Vermont, New Hampshire, Rhode Island) at 1,079, edging out third-place Region 2 (New York, New Jersey, Puerto Rico and the Virgin Islands) with 1,049.

Across all Regions, OSHA formally opened 470 inspections, some 335 of which involved worker fatalities/catastrophies. Another 56 were associated with complaints and 30 more were triggered by referrals.

State-enforced programs, by contrast, received 12,029 complaints and 468 referrals in the same Period. Industry-specific and State-specific data were not provided for State programs. States, however, pursued a total of 542 inspections, including 216 arising out of complaints, 77 involving fatalities/catastrophes, and 112 stemming

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from referrals. Curiously, the States also coded 38 COVID-19 cases that involved accidents, while OSHA reported zero cases in that category. The remaining inspection case counts both at the federal and State levels involved COVID-19 matters that arose during the course of other programmed or unprogrammed inspection activities or from employer self-reports.

OSHA has been facing intense criticism lately for having only issued *one* COVID-19-related Citation and Notification of Penalty through the end of May. But the reality is that the fallout from the many still-open investigations has yet to be determined. OSHA has up to six months from the inception of an inspection to complete its investigation and issue a Citation and Notification of Penalty as enforcement action. As a result, the data in the table largely reflect inspections that are in their relative infancy on that timeline. Still, with pressure mounting on the agency to act, a step-up in enforcement activity is forthcoming.

The great weight of the front-end inspections in the Period no doubt fell heavily upon “essential” businesses that continued to operate while Governors across the country were shuttering “non-essential” businesses in their States with Stay-At-Home Orders. Moreover, the country was struggling with understanding the new virus and how to slow its transmission. Today, much more is known about the virus and reasonable methods and precautions that employers can undertake to mitigate the transmission of COVID-19 in the workplace. The Centers for Disease Control (CDC) and State Departments of Health have issued guidance, recommendations, and best practices, some of which target specific businesses or industries. With the benefit of better and more current information, States are reopening their economies and businesses are slowly being permitted to restore operations as authorized by their respective States’ guidance. OSHA also has the benefit of this information for enforcement purposes.

In some States, like New York, a reopening business must develop a COVID-19 Health and Safety Plan describing what measures employers will implement to mitigate COVID-19 risks and transmission among employees and patrons. New York has published industry-specific template plans for use by employers in their respective industry sectors. The New York plans incorporate, to some extent, familiar OSHA concepts of administrative and engineering controls to manage hazards, though without using such nomenclature. The template plans set a minimum floor for what may be acceptable from the State’s perspective, but the accompanying instructions also caution that businesses must still take care to ensure compliance with all OSHA obligations that may be applicable. While OSHA has not adopted any COVID-19-specific regulations, several pre-existing regulations may have applicability to a given work setting, as discussed in a prior alert. Perhaps more importantly, a State-based expectation to implement a COVID-19 Health and Safety Plan arguably produces a yardstick of sorts for measuring the reasonableness of an employer’s compliance with its General Duty Clause obligations. The Clause requires employers to “furnish to each of its employees a workplace that is free from recognized hazards that are causing or likely to cause death or serious physical harm.” A failure to take the time to implement an appropriate plan may not only lead to employee complaints that could spark an investigation, but enforcement activities by State or local authorities could lead to cross-referrals to federal OSHA or State-run programs for additional enforcement activity.

With restrictions easing and availability of personal protective equipment increasing, OSHA issued a new Interim Enforcement Response Plan that became effective on May 26. The latest guidance announced that OSHA would return to the inspection planning policies that existed pre-COVID-19, but the agency would continue to prioritize COVID-19

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inspections. While many COVID-19-related complaints may have been handled previously through informal letters, telephone investigations, and rapid response procedures, a general increase in on-site enforcement activity is likely imminent. Employers not only should be prepared to address their COVID-19 safety efforts, but must remember to ensure that other required safety compliance is not overlooked in the rush to reopen the doors of their businesses.

Please contact Jason Markel (716.848.1395), Glen Doherty (518.433.2433) or Charlie Kaplan (646.218.7513) if you would like assistance or have questions about the OSHA implications to your COVID-19 reopening plans or have other general OSHA-related concerns.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

If you received this alert from a third party or from visiting our website, and would like to be added to our OSHA alert mailing list or any other of our mailing lists, please visit us [HERE](#).

[1] Although OSHA states that the data is intended to include all valid complaints and referrals since February 1, 2020 bearing the N-16-COVID-19 code, the tables contain no daily breakdowns of the data for individual dates prior to April 20. OSHA continues to update the tables on a cumulative basis on a near daily basis.