NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | PRUET

RETURNING TO WORK: WORKPLACE SAFETY ISSUES

June 12, 2020

David Dubberly
Certified Employment and Labor Law Specialist

OVERVIEW

▶ **Law vs. guidance and recommendations**

  ▶ **OSH Act requirements**

  ▶ **OSHA, SC OSHA, CDC, EPA, FDA, and EEOC guidance**

     ▶ **OSHA guidance for recording COVID-19 cases (May 19, 2020)**

     ▶ **OSHA additional guidance for construction (June 1, 2020)**

     ▶ **CDC guidance for employers with workers at high risk (May 19, 2020)**

     ▶ **CDC guidance for office buildings (May 27, 2020)**

  ▶ **Industry recommendations**

▶ **Evans v. Walmart Inc.**

  ▶ **Worker's comp exclusive remedy in SC**

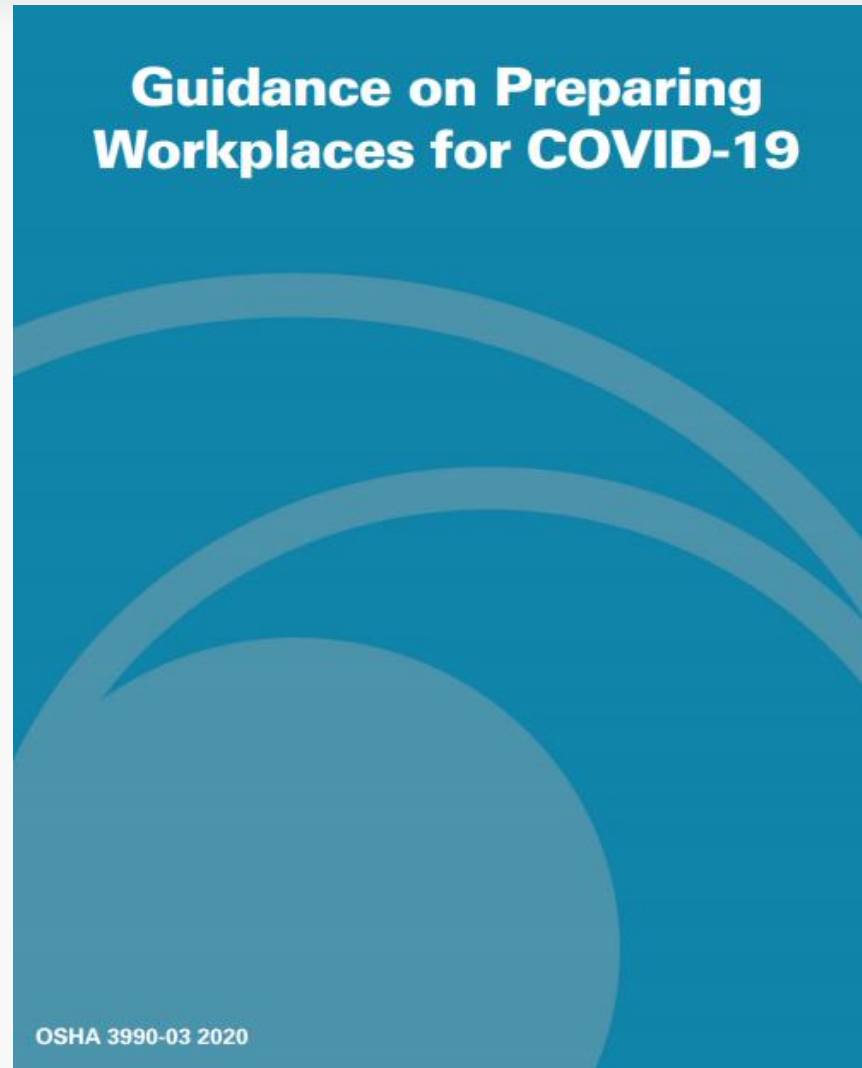▶ **OSHA first COVID-19 citation (May 18, 2020)**

▶ **Congressional developments**

OSH ACT REQUIREMENTS

▶ **Sec. 5(a)(1) "General duty clause"**

  ▶ **Requires each employer to keep workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees"**

  ▶ **Employer can be cited under GDC if there are feasible means to abate a serious hazard that it doesn't use**

▶ **Sec. 5(a)(2) Comply with applicable OSHA standards**

  ▶ **Examples may include guarding, hazcom, LO/TO, and PPE**

OSH ACT REQUIREMENTS

▶ **Sec. 11(c) No retaliation against employee for raising workplace safety concerns**

▶ **Sec. 13(a) Employee may refuse to work only if he/she has good faith belief there is imminent danger of death or serious injury**

  ▶ **If employer following OSHA and CDC guidance, most employees should not be in danger**

  ▶ **But workers at high risk may be entitled to reasonable accommodation under ADA**
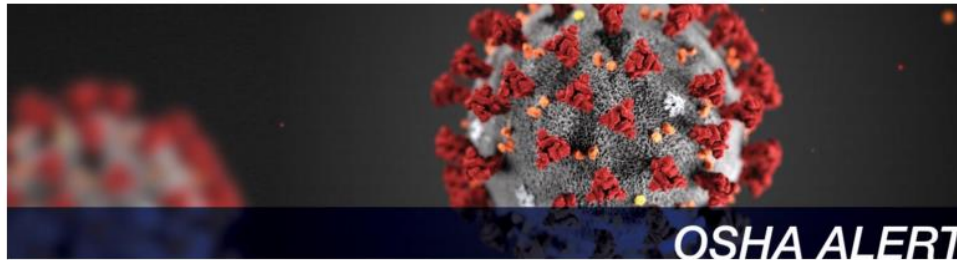
OSHA EXPOSURE LEVEL GUIDANCE (MARCH 9, 2020)

Guidance on Preparing Workplaces for COVID-19

OSHA 3990-03 2020

OSHA EXPOSURE LEVEL GUIDANCE
(MARCH 9, 2020)

OSHA EXPOSURE LEVEL GUIDANCE (MARCH 9, 2020)

► **Divides jobs into four risk exposure levels**

  ► **Lower exposure risk level**

    ► **Office positions that involve minimal contact with general public and co-workers**

  ► **Medium exposure risk**

    ► **Manufacturing, construction, and retail positions that involve high frequency contact with general public and co-workers**

  ► **High exposure risk**

    ► **Healthcare and EMS positions that involve exposure to patients**

  ► **Very high exposure risk**

    ► **Healthcare and lab positions that involve exposure to specimens**

► **Recommends engineering and administrative controls, safe work practices, and/or PPE for each level**

OSHA INDUSTRY GUIDANCE (STARTING APRIL 21, 2020)

OSHA INDUSTRY GUIDANCE (STARTING APRIL 21, 2020)

- ▶ **Package delivery**

- ▶ **Manufacturing**

- ▶ **Construction**

- ▶ **Rideshare, taxi, and car service**

- ▶ **Retail**

- ▶ **Retail pharmacies**

- ▶ **Restaurants and beverage vendors offering takeout**

- ▶ **Nursing homes**

- ▶ **Dental practices**

OSHA GUIDANCE FOR RECORDING COVID-19 CASES (MAY 19, 2020)

► **Case is a recordable illness if:**

  ► **Confirmed**

  ► **Work-related**

  ► **Results in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness**

May 19, 2020

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
                       STATE PLAN DESIGNEES

THROUGH: AMANDA EDENS
              Deputy Assistant Secretary

FROM: LEE ANNE JILLINGS, Acting Director
          Directorate of Technical Support and Emergency Management

          PATRICK J. KAPUST, Acting Director
          Directorate of Enforcement Programs

SUBJECT: Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)

OSHA GUIDANCE FOR RECORDING COVID-19 CASES (MAY 19, 2020)

▶ **Factors OSHA will consider in evaluating employer's work-related analysis:**

  ▶ **Reasonableness of employer's investigation into work-relatedness**

  ▶ **Evidence available to employer**

  ▶ **Evidence COVID-19 illness was contracted at work**

    ▶ A factor weighing in favor of work-relatedness:

      ▶ Several cases developing among workers who work closely together and there is not an alternative explanation

    ▶ A factor weighing against work-relatedness:

      ▶ Worker who tests positive is only worker in his or her vicinity to contract virus

OSHA ADDITIONAL GUIDANCE FOR CONSTRUCTION (JUNE 1, 2020)

- **Determine what risk level each work task falls under**
  - **Most construction tasks are in low, medium, or high-risk categories, not very-high risk category**

- **Create plan that eliminates or controls related hazards**
  - **Use engineering controls, administrative controls, safe work practices, and PPE**

Construction work tasks associated with exposure risk levels

Lower (caution)	Medium	High
▪ Tasks that allow employees to remain at least 6 feet apart and involve little contact with the public, visitors, or customers. Note: For activities in the lower (caution) risk category, OSHA's *Interim Guidance for Workers and Employers of Workers at Lower Risk of Exposure* may be most appropriate.	▪ Tasks that require workers to be within 6 feet of one another. ▪ Tasks that require workers to be in close contact (within 6 feet) with customers, visitors, or members of the public.	▪ Entering an indoor work people such as other w customers, or residents having or known to hav including when an occu reports signs and symp with COVID-19. Note: Employers may consi work following the guidance

OSHA – ADDITIONAL GUIDANCE FOR CONSTRUCTION (JUNE 1, 2020)

▶ **Addresses precautions to take when work performed in occupied homes or other buildings**

▶ **Highlights and generally recommends the use of cloth face coverings**

▶ **Train workers on plan**

Cloth Face Coverings in Construction
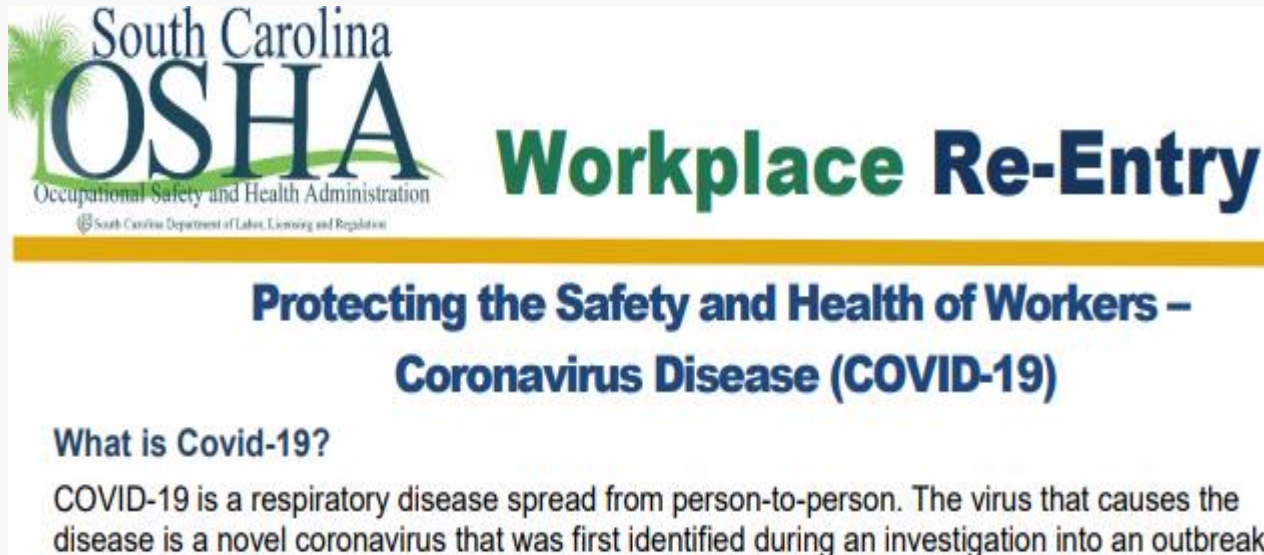
CDC **recommends** wearing cloth face coverings as a protective measure in addition to social distancing coverings may be especially important when social distancing is not possible or feasible based on work large respiratory droplets that a person spreads when talking, sneezing, or coughing. Cloth face coverings may COVID-19 from spreading it to others. Cloth face coverings are intended to protect other people—not the wearer

Cloth face coverings are not PPE. They are not appropriate substitutes for PPE such as respirators (like workplaces where respirators or facemasks are recommended or required to protect the wearer.

While wearing cloth face coverings is a public health measure intended to reduce the spread of COVID-19 in co face covering for the full duration of a work shift (e.g., eight or more hours) on a construction site if they become cloth face coverings are worn on construction sites, employers should provide readily available clean cloth face the coverings become wet, soiled, or otherwise visibly contaminated.

SC OSHA RTW GUIDANCE
(MAY 14, 2020)

▶ **Mostly reiterates OSHA and CDC guidance**

▶ **Same for DHEC RTW guidance and accelerateSC final report**

South Carolina
OSHA
Occupational Safety and Health Administration
South Carolina Department of Labor, Licensing and Regulation

Workplace Re-Entry

Protecting the Safety and Health of Workers –
Coronavirus Disease (COVID-19)

What is Covid-19?

COVID-19 is a respiratory disease spread from person-to-person. The virus that causes the disease is a novel coronavirus that was first identified during an investigation into an outbreak

If employers are unable to provide the necessary protections listed, including access to PPE, resuming operations is not recommended.

CDC AND EPA "DECISION TOOL" FOR DISINFECTING (MAY 7, 2020)

GUIDANCE FOR CLEANING & DISINFECTING

PUBLIC SPACES, WORKPLACES, BUSINESSES, SCHOOLS, AND HOMES

SCAN HERE FOR MORE INFORMATION

1 DEVELOP YOUR PLAN

DETERMINE WHAT NEEDS TO BE CLEANED. Areas unoccupied for 7 or more days need only routine cleaning. Maintain existing cleaning practices for outdoor areas.

DETERMINE HOW AREAS WILL BE DISINFECTED. Consider the type of surface and how often the surface is touched. Prioritize disinfecting frequently touched surfaces.

CONSIDER THE RESOURCES AND EQUIPMENT NEEDED. Keep in mind the availability of cleaning products and personal protective equipment (PPE) appropriate for cleaners and disinfectants.

2 IMPLEMENT

CLEAN VISIBLY DIRTY SURFACES WITH SOAP AND WATER prior to disinfection.

USE THE APPROPRIATE CLEANING OR DISINFECTANT PRODUCT. Use an EPA-approved disinfectant against COVID-19, and read the label to make sure it meets your needs.

ALWAYS FOLLOW THE DIRECTIONS ON THE LABEL. The label will include safety information and application instructions. Keep disinfectants out of the reach of children.

3 MAINTAIN AND REVISE

CONTINUE ROUTINE CLEANING AND DISINFECTION. Continue or revise your plan based upon appropriate disinfectant and PPE availability. Dirty surfaces should be cleaned with soap and water prior to disinfection. Routinely disinfect frequently touched surfaces at least daily.

MAINTAIN SAFE PRACTICES such as frequent handwashing, using cloth face coverings, and staying home if you are sick.

CONTINUE PRACTICES THAT REDUCE THE POTENTIAL FOR EXPOSURE. Maintain social distancing, staying six feet away from others. Reduce sharing of common spaces and frequently touched objects.

CDC "DECISION TOOL" FOR RTW (LATEST VERSION MAY 15, 2020)

WORKPLACES DURING THE COVID-19 PANDEMIC

The purpose of this tool is to assist employers in making (re)opening decisions during the COVID-19 pandemic, especially to protect vulnerable workers. It is important to check with state and local health officials and other partners to determine the most appropriate actions while adjusting to meet the unique needs and circumstances of the local community.

Should you consider opening?
✓ Will reopening be consistent with applicable state and local orders?
✓ Are you ready to protect employees at higher risk for severe illness?

ALL YES →

ANY NO ↓

DO NOT OPEN

Are recommended health and safety actions in place?
✓ Promote healthy hygiene practices such as hand washing and employees wearing a cloth face covering, as feasible
✓ Intensify cleaning, disinfection, and ventilation
✓ Encourage social distancing and enhance spacing between employees, including through physical barriers, changing layout of workspaces, encouraging telework, closing or limiting access to communal spaces, staggering shifts and breaks, and limiting large events, when and where feasible
✓ Consider modifying travel and commuting practices. Promote telework for employees who do not live in the local area, if feasible.
✓ Train all employees on health and safety protocols

ALL YES →

ANY NO ↓

MEET SAFEGUARDS FIRST

Is ongoing monitoring in place?
✓ Develop and implement procedures to check for signs and symptoms of employees daily upon arrival, as feasible
✓ Encourage anyone who is sick to stay home
✓ Plan for if an employee gets sick
✓ Regularly communicate and monitor developments with local authorities and employees
✓ Monitor employee absences and have flexible leave policies and practices
✓ Be ready to consult with the local health authorities if there are cases in the facility or an increase in cases in the local area

ALL YES →

ANY NO ↓

MEET SAFEGUARDS FIRST

OPEN AND MONITOR
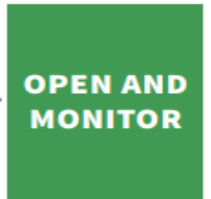
CDC GUIDANCE FOR EMPLOYERS WITH WORKERS AT HIGH RISK (MAY 19, 2020)

▶ **Pages 46-48 of "CDC Activities and Initiatives Supporting the COVID-19 Response" publication**

▶ **"High-risk worker"=any individual over age 65 or with underlying medical condition**

▶ **Encourage workers at higher risk to self-identify, but avoid making unnecessary medical inquiries or unilaterally excluding some workers from workplace**

▶ **Protect higher-risk employees by supporting and encouraging options to telework**

    ▶ **When telework not feasible, consider offering duties that minimize contact with customers and other employees as reasonable accommodation**

CDC GUIDANCE FOR OFFICE BUILDINGS (MAY 27, 2020)

Centers for Disease Control and Prevention
CDC 24/7: Saving Lives, Protecting People™

COVID-19 Employer Information for Office Buildings

- ▶ **Evaluation of building**
  - ▶ **Check HVAC systems**
  - ▶ **"Increase circulation of outdoor as much as possible"**
  - ▶ **Check mechanical and life safety systems**
- ▶ **Assessment of risk**
  - ▶ **Identify where and how employees could be exposed to COVID-19 (e.g., in meeting rooms and break rooms)**

CDC GUIDANCE FOR OFFICE BUILDINGS (MAY 27, 2020)

► **Implementation of controls**
  ► **Engineering controls**
    ► **Reconfiguring workspaces**
    ► **Physically separating employees**
  ► **Administrative controls**
    ► **"Consider … daily … health checks (e.g., symptoms and/or temperature screening) of employees before they enter worksite"**
    ► **"Employees should wear a cloth face covering to cover their nose and mouth in all areas of the business"**

CDC GUIDANCE FOR OFFICE BUILDINGS (MAY 27, 2020)

► **Education of employees**

  ► **Use posters and notices to educate employees on symptoms, staying home when sick, social distancing, etc.**
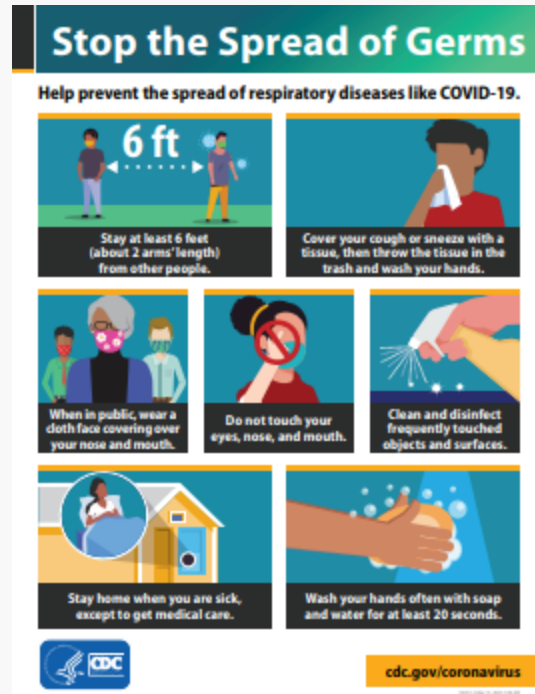
Best Practices for Retail Food Stores, Restaurants, and Food Pick-Up/Delivery Services During the COVID-19 Pandemic

EEOC GUIDANCE ON APPLICATION OF ADA (LATEST VERSION MAY 7, 2020)

U.S. Equal Employment Opportunity Commission

What You Should Know About the ADA, the Rehabilitation Act and the Coronavirus

The ADA and Rehabilitation Act rules continue to apply, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC about steps employers should take regarding the Coronavirus.

INDUSTRY RECOMMENDATIONS

NRF ® NATIONAL **RETAIL** FEDERATION®

S Seyfarth

Operation Open Doors
Checklist

This checklist represents guidance from members and subject matter experts, and is intended to highlight key topics to consider as retailers seek to re-open operations. Your individual facts and circumstances will be unique, and we encourage you to work with your preferred legal and financial advisors to adapt this guidance to your specific situation. We also recommend using this checklist in conjunction with our Interactive 50-State Tracker Map (also found in the Members section of

R RETAIL INDUSTRY LEADERS ASSOCIATION

NRF ® NATIONAL **RETAIL** FEDERATION®

Open for Business – A Blueprint for Shopping Safe

America's retailers have been on the front lines of the COVID-19 crisis, with grocers, pharmacies, and other retailers working hard to make sure every family has what they need as America has stayed home. However, many retailers were required to shut down

INDUSTRY RECOMMENDATIONS

RECOVERY READINESS
A HOW-TO GUIDE FOR REOPENING YOUR WORKPLACE
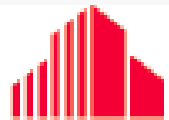
CUSHMAN & WAKEFIELD

SOCIAL DISTANCING

Space planning solutions can be used to reduce transmission of contagious diseases among colleagues at work through social distancing. Solutions may differ depending on how many people are expected to return to work versus continuing to work from home. Understanding that dynamic will allow calculation of the total workforce expected to be accommodated in the office and assessment of the demand for workspaces.

Note: Public safety codes, building codes, applicable laws and security requirements must not be compromised to achieve social distancing.

Consider the following range of precautions and social distancing measures:

6 Feet Office Protocols (see next page)

Space use / density monitoring

- Determine a method for conducting regular counts of occupants per floor
- Add sensors to quantify utilization of spaces
- Provide real-time meters/dashboards at entries to display how many people are present, if possible

Circulation spaces

- Designate and signpost the direction of foot-traffic in main circulation paths: corridors, stairs, entries
- Consider one-way circulation routes through the workplace
- Mark increments of locally acceptable social distance on floors where queues could form

Individual seats

- Only use alternate desks (checkerboard); disable the use of alternate desks; or remove alternate desks altogether

EVANS V. WALMART INC.

12-Person Jury

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION**

TONEY EVANS, Special Administrator)
Of the Estate of WANDO EVANS, Deceased)
)
                Plaintiff) Case No.: **2020L003938**
   v.)
)
WALMART, INC. , and J2M – EVERGREEN,)
LLC)
            Defendants.)

COMPLAINT AT LAW

TONEY EVANS, Special Administrator of the Estate of WANDO EVANS,

Deceased, by and through his attorneys, Tony S. Kalogerakos, Esq. and the Injury

EVANS V. WALMART INC.

- **Wrongful death suit by estate of employee who died, allegedly from exposure to COVID-19 at work**
- **Claims negligence and "willful and wanton misconduct" in failing to provide safe and healthy work environment because employer didn't follow:**
  - **OSHA's COVID-19 exposure-specific guidance**
  - **CDC's COVID-19 general guidance**
    - **Eight alleged instances of this, including that it didn't enforce social distancing, properly sanitize the store, or provide sufficient PPE for employees**

EVANS V. WALMART INC.

► **Complaint may be subject to dismissal to extent it doesn't allege intentional conduct**

  ► **To get around exclusive remedy of worker's comp in IL and sue for damages, employee must show intentional conduct**

WORKER'S COMP EXCLUSIVE REMEDY IN SC

▶ S.C. Code § 42-1-540: SCWCA "exclude[s] all other rights and remedies" other than those afforded by Act "on account of" work-related personal injuries

▶ *Edens v. Bellini*: Exception where injury is not accidental but rather results from intentional act of employer; requires deliberate and specific intent to injure employee

- ▶ Will be hard to show employer had deliberate and specific intent for employee to contract COVID-19
- ▶ Especially if employer followed OSHA and CDC guidance

OSHA FIRST COVID-19 CITATION
(MAY 18, 2020)

Bloomberg Law

Occupational Safety & Health Reporter℠

First Virus–Related OSHA Citation Goes to Georgia Nursing Home

May 29, 2020, 4:24 PM

🔊 Listen 🖨 ✉ 📘

OSHA has issued its first citation from a coronavirus-related inspection to a Georgia nursing home.

The citation was issued to Winder Nursing Inc. of Winder, Ga., for a recordkeeping violation, an Occupational Safety and Health Administration spokesperson said Friday.

The citation alleges Winder Nursing failed to report to OSHA within one day about the hospitalization of six employees that occurred as early as April 19. OSHA wasn't notified until May 5.

The violation was categorized as an other-than-serious violation, the lowest level of OSHA infractions and carried a proposed $6,504 fine.

Bruce Rolfsen
Reporter

Related Articles

OSHA Chief Grilled on Virus Enfo
Lack of Rulemaking (1)
May 28, 2020, 10:31 AM

OSHA Will Focus Virus Inspectio
'Imminent Danger' Sites
April 14, 2020, 12:49 PM

CONGRESSIONAL DEVELOPMENTS

► HEROES Act passed House May 15, 2020 but will not pass Senate

  ► Would require OSHA to issue standards requiring that workplaces comply with CDC guidance

► White House and Senate plan to propose stimulus legislation in July 2020 that provides liability protection for businesses

  ► Possible safe harbor if precautions taken to protect employees and customers, but not if business was grossly negligent

    ► May hinge on compliance with OSHA and CDC guidance

QUESTIONS/COMMENTS?

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