

# COVID-19: Oregon OSHA Activities

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# Oregon OSHA Enforcement of “Stay Home/Stay Safe” and “Reopening a Safe and Strong Oregon”

Oregon OSHA has continued to apply the Oregon Safe Employment Act, so our enforcement jurisdiction remains limited to the workplace

In the absence of a specific set of workplace regulatory provisions addressing COVID-19, Oregon OSHA continues to enforce guidance in the various Governor’s Executive Orders, in most cases by applying general rules related to employer obligations to provide a safe and healthful workplace, such as the following:

- Personal Protective Equipment
- Health Hazard Controls
- Supervision and Training
- Extraordinary Hazards

# Oregon OSHA Enforcement of “Reopening a Safe and Strong Oregon”

Oregon OSHA has continued to look to the Governor’s Executive Orders and related guidance from the Oregon Health Authority.

The OHA guidance includes both mandates and recommendations. To the degree workers are exposed, Oregon OSHA enforces the mandatory language of the OHA guidance. Oregon OSHA does not enforce the recommendations -- except in the context where they provide guidance about appropriate ways to address hazards that can otherwise be documented in the workplace (relying upon a fact-specific assessment of the nature of any “recognized hazards” to which workers are exposed).

# Oregon OSHA COVID-19 Complaint Workload

Data current as of September 21, 2020

- From March through May, Oregon OSHA received 4745 complaints specific to COVID-19 issues. In a typical year, Oregon OSHA receives about 2,000 complaints, or fewer than 40 per week.
- During the 3 months from June through August, Oregon OSHA received 4364 complaints specific to COVID. Since then, we have received an additional 2508 such complaints.
- That represents a total of 11,617 COVID-19 complaints -- and non COVID complaints have more than doubled during the same period, with 2623.
- That means that in less than 7 months, we have received 14,240 total complaints - more than 7 years worth of complaints.

# COVID-19 Complaints by Selected Industry/Activity

Data current as of September 21, 2020

Most Frequent Industry/Activity Types	Number	Percentage
Grocery Stores (including Convenience Stores)	1981	17%
Retail (all categories not listed)	1910	16%
Restaurants, Bars & Food Service	1724	15%
Manufacturing (including Forest Products)	792	7%
Service (all categories not listed)	755	6%
Health Care (not otherwise listed)	643	6%
Gyms and Recreational Activities	579	5%
Offices (including Call Centers & Financial Institutions)	423	4%
Government (State & Local)	362	3%
Construction & Landscaping, etc.	360	3%
Salons and other Personal Services	357	3%

# The Nature of the Complaints

Complaints now focus primarily on facial coverings, but a large number also still involve the following:

- business is not enforcing social distancing;
- business (particularly those involving offices) is not maximizing telework opportunities;
- business is failing to act or to share information about one or more people complainant believes have COVID-19

# Resolving the Cases

Oregon OSHA has been able to resolve more than 2/3 of the complaints received to date without an onsite enforcement visit.

# Responding to Complaints

- Oregon OSHA's formal onsite enforcement activity continues to be limited; because of the volume and the level of understandable uncertainty about what employers must do, we have opened roughly 160 inspections to date.
- We have completed 107 of those inspections, with 44 resulting in at least one violation (although not always based on COVID-19 issues) -- that 59 percent "in compliance" rate compares to a normal rate between 25 and 30 percent.
- Of the 44, 20 were directly related to COVID-19.

# Addressing COVID-19 through Consultation & Education

- Oregon OSHA's complaint investigations routinely include sharing COVID-19 educational materials with employers and with complainants.
- We have posted COVID-19 specific resources (ours and links to other agencies and other resources from industry groups and professional associations on our web page at <https://osha.oregon.gov/covid19/Pages/default.aspx>.
- Oregon OSHA consultants have handled hundreds of inquiries specific to COVID-19, providing "virtual" consultations, limited on site visits, and assistance in responding to issues raised in complaints.

# Formal Inspection Results

(not all public, pending acknowledgment of employer receipt)

- Since March, Oregon OSHA has issued 20 citations to employers for violating requirements to protect workers from COVID-19.
- 14 citations including serious violations, with penalties totaling between \$100 to \$2,000,
- Because of the efforts to address problems without an inspection, an unusual proportion of the inspections have generated willful violations, with 6 such inspections, where penalties ranged from the minimum of \$8,900 up to \$14,000 (the maximum penalty for a willful violation is \$126,749).
- In these cases, any willful violations were all based on Oregon OSHA's determination that the employer had plainly refused to comply.

# Oregon OSHA Appeal Process

- Employer has 30 calendar days to appeal an Oregon OSHA citation
- Most appeals are resolved (settled) following informal conference to discuss issues and consider additional employer information
- If appeals cannot be resolved, they are heard by an Administrative Law Judge (ALJ) at the Workers Compensation Board, who issues an independent decision that represents the final decision of the Board (and cannot actually be reviewed by the Board itself).
- The ALJ's decision can be appealed to the Oregon Court of Appeals.

# Next steps .... in addressing COVID-19 in the workplace

- Temporary rulemaking to address COVID-19 exposures in the workplace (currently expected to be adopted by October 1, with an initial effective date of October 10).
- Permanent rulemaking to address COVID-19 exposures with “intermediate” provisions after the temporary rule expires – one purpose of the “permanent” rule is to continue to address the temporary situation, which will likely last more than the 180 days allowed by a temporary rule.
- Permanent rulemaking to address infectious disease risks on an ongoing basis – primarily focused on “high risk” situations and pre-planning for possible future emergencies.

# COVID-19 temporary rulemaking

- Began rulemaking project June 26
- Held more than a dozen virtual stakeholder forums during July and early August to gather input from employers, workers and others before developing a draft temporary rule
- Circulated draft on August 17, initially asking for comments within two weeks (later extended to three weeks)
- Received more than 1700 individual comments (although a number of individuals commented multiple times)
- Met multiple times with Oregon OSHA Partnership Committee to discuss feedback and specific questions raised by the comments

# Concerns expressed about COVID-19 temporary rule draft

- Pandemic is not real or is overstated and no rule should be adopted
- Sanitation requirements in the draft are excessively burdensome (they are and will be corrected - drafting error)
- Draft rule unnecessarily duplicates existing guidance from OHA and others
- Draft rule is inconsistent with guidance from OHA and others
- Requiring medical removal would be an employment benefit and therefore outside Oregon OSHA's rulemaking authority (also frequently described as applying to all workplaces, which is not the intention)
- Rule should require 80-hour paid benefits to be extended to all employers after federal FFCRA expires

# Concerns expressed about COVID-19 temporary rule draft

- Draft rule does little to address aerosol exposures/ventilation
- Draft rule does not require enough planning, program development and employee participation, particularly for those employers not identified as “heightened” or “exceptional” risk
- Draft rule should include additional exemptions (conditional or otherwise) in addition to the proposed conditional exemption for schools
- Draft rule should include no exemptions
- Oregon’s draft rule does not closely mirror Virginia’s recently adopted temporary rule, which requires more and is therefore more protective

# Concerns expressed about COVID-19 temporary rule draft

- Draft rule needs to provide more specific guidance regarding appropriate controls and PPE
- (Social) distancing officer should apply to all workplaces
- (Social) distancing officer requirement should be removed
- Written plan and risk assessment should apply to all workplaces
- Draft rule will not protect workers in agriculture labor housing after the current temporary rule expires
- Draft rule does not provide protection against retaliation
- Draft rule will (and should not) expand the private right of action in relation to workplace health and safety

# Next steps ....

## COVID-19 temporary rulemaking

- Significant revisions being made now to draft based on comments received
- Near-final draft to be produced September 25 for review by Partnership Committee members and by members of permanent infectious disease rulemaking advisory committees
- Expanded Partnership Committee meetings on September 28 (general workplace) and September 29 (health care) to consider drafting errors and issues of clarity
- Finalize and adopt rule by October 1 or 2
- Initial effective date October 12
- Delayed effective dates for certain requirements related to planning, training and documentation

# Infectious disease permanent rulemaking

- Two 25-member Rulemaking Advisory Committees (one for the General Workplace and one for Health Care) have been appointed but not yet begun to meet
- Both RACs will begin active work during October and into November, targeting an early draft rule in early November
- Plan to file a formal proposal for permanent rule early in December, with public comment to be taken through February 28
- Plan to make decision on whether to adopt provisions of permanent rule before expiration of temporary rule in late March, with delayed effective dates for any provisions in the permanent rule that are not already required by the temporary rule

# Protection against retaliation (ORS 654.062)

It is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because the employee or prospective employee has:

- (a) Opposed any practice forbidden by [the Oregon Safe Employment Act and related statutes];
- (b) Made any complaint or instituted or caused to be instituted any proceeding under or related to [the Oregon Safe Employment Act, etc.] or has testified or is about to testify in any such proceeding;
- (c) Exercised on behalf of the employee, prospective employee or others any right afforded by [the Oregon Safe Employment Act, etc.]; or
- (d) In good faith reported an assault that occurred on the premises of a health care employer as defined in ORS 654.412 or in the home of a patient receiving home health care services.

# Protection against retaliation

- The law gives enforcement responsibility to the Bureau of Labor and Industries. Oregon OSHA remains accountable to federal OSHA, so we review BOLI's activities (as does federal OSHA).
- Workers can file complaints up to 90 days after alleged retaliation (30 days under federal OSHAct, which also applies to Oregon workers).
- BOLI must identify protected activity and an adverse employment action and be able to document a nexus between them. Burden is on BOLI and worker)
- Workers can request case review by Oregon OSHA Administrator.
- Workers can also pursue a private right of action.

# Protection against retaliation

Oregon OSHA communicates the about the provision in several ways:

- The required “It’s the Law” poster advises workers of their right to be free from retaliation and that they can file complaints with BOLI within 90 days and/or with federal OSHA within 30 days
- The complaint web page highlights the anti-retaliation provision and provides a link to more detailed guidance (including how to file a complaint with BOLI)
- Correspondence with workers (and employers) highlights anti-retaliation provisions and advises workers how to file a complaint with BOLI
- When we conduct interviews with workers, we advise them of their right to be protected from retaliation (and we so advise employers during every contact with them)

# Questions and Follow-up

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