

WORK SHOULDN'T HURT

Making OSHA Complaints on COVID-19 Following the Removal of the OSHA Healthcare Emergency Temporary Standard

July 2022

Healthcare workers have rights, and employers have obligations to keep workers safe from COVID-19, even though the Occupational Safety and Health Administration withdrew the COVID-19 Emergency Temporary Standard (ETS) in December 2021.ⁱ The AFT and labor allies sued the agency to restore the ETS and to set a permanent standard. OSHA is working on a new permanent standard, expected in late 2022.

The withdrawal of the ETS does not relieve employers from their duty to protect workers under the general duty clause of the Occupational Safety and Health Act and current standards, such as the respiratory protection standard and personal protective equipment standard.ⁱⁱ Making a complaint to OSHA sends a powerful message to our members and to the employer.

Recordkeeping and Reporting Requirements under the ETS and the OSHA Recordkeeping and Reporting Rule
The recording and reporting requirements in the ETS are still in effect in addition to the older recordkeeping and reporting rule. Recordkeeping and reporting requirements provide essential information for union leaders to know what is going on in the facility.

OSHA takes recordkeeping and reporting failures seriously. If the employer is not recording employee cases on the COVID-19 log, the employer may be cited.

Employers will be cited for failing to report employee hospitalizations or deaths from COVID-19. If the employer does maintain the COVID-19 log and the number of infected employees is high, the union can argue that there is uncontrolled infection spread in the workplace.

Under the remaining recordkeeping and reporting requirements of the ETS, the employer must continue to keep a log of all cases of employees infected with COVID-19, regardless of whether the employees were exposed at work.ⁱⁱⁱ The union has a right to get a redacted copy by the end of the next business day. The union does not have the right to the names, contact information or occupation of people listed on the log, but can get the other information, including the dates and locations of exposure and dates symptoms started. The employer must record cases on the log within 24 hours of being notified. The employer must also notify OSHA of work-related COVID-19 fatalities within eight hours and work-related hospitalizations in 24 hours.

Under the recordkeeping and reporting rule, the employer must still record all work-related cases of COVID-19 that resulted in lost days of work on the OSHA 300 log.^{iv} Names should not be redacted on the OSHA 300 log with a few exceptions.^v It is important that the employer record all work-related cases on the OSHA 300 log for employees who will need to claim

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workers' compensation, particularly if they experience long COVID-19. Unless there is a state workplace presumption law, the employer is likely to undercount work-related cases.

Information Request and Complaint Tips:

- Ask for copies of the COVID-19 log and the OSHA 300 log on a regular basis and compare the logs.
- Individual employees have the right to see their entry on the COVID-19 log. Encourage members have been infected to request a copy of their log information so that you can check to see if the employer is maintaining the log. The union can also request incident reports (the OSHA 301 form).
- Include both logs and any relevant OSHA 301 forms as attachments to your complaint.

Using the General Duty Clause to Address Unsafe Working Conditions

OSHA relies on the general duty clause when there is no specific standard for a hazard. To cite an employer under the general duty clause, OSHA looks for *evidence that the employer recognized, but failed to abate a hazard that can cause death or serious physical harm—and there were feasible methods to correct the hazard.*

Although OSHA has no direct authority over staffing, inadequate staffing causes a host of recognized health and safety hazards for healthcare workers, which you can include in a complaint. Unsafe staffing results in:

- Angry patients and visitors assaulting healthcare workers.
- Back, neck and shoulder injuries for staff who don't have time to get equipment or find help to do patient lifts.
- Needlesticks; slip, trip and fall injuries; and other incidents that happen when people are rushing.
- Stress and all its manifestations: cardiovascular and gastrointestinal problems, fatigue, moral injury, and bullying.

OSHA may also consider a general duty clause citation if the employer fails to follow Centers for Disease Control

and Prevention infection control guidance, or the employer's own policies and procedures to prevent the spread of infection in the workplace.^{vi}

Information Request and Complaint Tips:

- Include examples of when the employer has failed to follow CDC guidance or its own policies and protocols.
- When describing and documenting illnesses and injuries, include documentation on what the staffing was during that timeframe. Show that improved staffing is a feasible means of preventing the hazards.

Respiratory Protection Standard and Personal Protective Equipment Standard^{vii}

OSHA states that the respiratory protection standard applies to personnel *providing care* to people with suspected or confirmed COVID-19.^{viii} The ETS specified that this included employees *exposed to* persons with suspected or confirmed COVID-19 and when conducting aerosol-generating procedures (AGPs). The respiratory standard should still apply to personnel who are exposed or in close contact regardless of their role, such as environmental services staff. The requirements of the standard include:

- Medical evaluation because respirator use makes breathing difficult for people with heart and lung conditions.
- Annual fit testing and novel fit testing for any respirator model that is new for the wearer to ensure there is no leakage.
- Training on proper donning, doffing, and conducting seal checks.

Due to high community case levels and the increased transmissibility of omicron, all staff should have access to fit-tested respirators, not just workers in emergency departments and COVID-19 care units. If the employer refuses to provide respirators in other units and workers are getting infected, OSHA should be notified.

Employers should provide respirators that have been approved by the National Institute for Occupational Safety and Health (NIOSH). Counterfeit respirators or those that have expired, have been decontaminated, or were approved by other governments do not meet the

respiratory protection standard.^{ix} OSHA will enforce other parts of the personal protective equipment standard. The employer must continue to provide gowns, gloves and eye protection.

Information request:

- Focus information requests on the last six months. OSHA will not currently investigate older issues.
- The union does not have the right to request the COVID-19 prevention plan but does have a right to the infectious disease prevention plan required by the respiratory protection standard.
- Request a copy of any written communications to staff on use of PPE.
- Ask members to share information and documentation on access to N95s and other PPE, including any extended use or reuse. Employers should not be rationing N95s any longer.
- Ask members if they have access to fit-tested, NIOSH-approved respirators.
- Ask members if fit-testing has resumed—staff who need respirators should be fit-tested annually and any time they must use a respirator model that is new to them.

Whistleblower Rights

Employees are protected from discrimination or discharge for exercising their right to protections, including making a complaint under Section 11(c) of the Occupational Safety and Health Act. Workers only have 30 days to file a complaint, and OSHA does not have enough staff to investigate retaliation claims. AFT Health Issues staff can assist in writing a whistleblower complaint if needed.

Tips for Writing an OSHA Complaint

- **Write the complaint, do not call it in.** OSHA is less likely to investigate an unwritten complaint. You can use the OSHA complaint form as a guide, but it is not required.
- **Assess members' accounts** of the workplace reality to determine potential violations of standards and the general duty clause.

Interview workers to write specific descriptions of exposures, units, job titles, and lags in protection—provide as much detail as possible.

- **Gather as much documentation** (employer memo and messages, photos of message boards, etc.) as possible. Compile and include descriptions of any failures of the employer to follow Centers for Disease Control and Prevention guidance and the employer's own policies and procedures.
- **Provide the name and address of the facility.** Name the CEO and the lead safety coordinator.
- **Identify the union** and include how many employees and job titles the union represents.
- **Do not assume OSHA is familiar with the employer or with healthcare generally.** Spell out acronyms and identify department names.
- **Attach the documentation as appendices,** keeping the information organized for easy reference.
- **If the leader is the signer,** be sure to provide the individual's contact information and your name and contact information as the person following up. Ask to be included in all correspondence and the opening conference. Keep track of your correspondence with OSHA.
- **Identify a leader, steward, or trusted member** who can be available to attend an unannounced inspection—at least one for every shift—if a compliance officer shows up to inspect the facility. You will not be told in advance. The compliance officer will ask the employer to notify the union that an inspection is about to begin, but there will not be much notice. The start of the inspection is the opening conference.
- **The complaint can be sent to OSHA by mail, fax, or online submission.** We recommend

sending it first by email with a “read receipt,” followed up with a mailed copy. Attach documentation that has been organized to correspond to the problems listed. See [File a Complaint | Occupational Safety and Health Administration \(osha.gov\)](#).

- **Writing a complaint can be a union-building activity.** Getting OSHA to investigate can be counted as a victory even if OSHA does not issue a citation or only issues a warning letter.

For more information or assistance, please contact the health and safety team at 4healthandsafety@aft.org

ⁱ [COVID-19 - Regulations | Occupational Safety and Health Administration \(osha.gov\)](#) This is a comprehensive list of existing standards relevant to protecting workers from COVID-19. The ETS is still listed for reference.

ⁱⁱ [COVID-19 Healthcare ETS | Occupational Safety and Health Administration \(osha.gov\)](#)

ⁱⁱⁱ See sections 29 CFR 1910.502(q)(2)(ii), 1910.502(q)(3)(ii)-(iv), and 1910.502(r) for the remaining recordkeeping and reporting requirements at [1910.502 - Healthcare. | Occupational Safety and Health Administration \(osha.gov\)](#).

^{iv} [Recordkeeping—Overview | Occupational Safety and Health Administration \(osha.gov\)](#)

^v The employer does not record the names for privacy cases, including injury to an intimate or reproductive body part, injury from sexual assault, mental illness, cases of infection with HIV,

tuberculosis, and hepatitis, needlestick injuries, or if the worker requests confidentiality. [OSHA Forms for Recording Work-Related Injuries and Illnesses](#)

^{vi} [Guideline for Isolation Precautions: Preventing Transmission of Infectious Agents in Healthcare Settings](#)

^{vii} [Personal Protective Equipment—Overview | Occupational Safety and Health Administration \(osha.gov\)](#)

^{viii} [Respiratory Protection—Overview | Occupational Safety and Health Administration \(osha.gov\)](#)

^{ix} See [Approved N95 Respirators 3M Suppliers List | NPPTL | NIOSH | CDC](#) and [Counterfeit Respirators / Misrepresentation of NIOSH-Approval | NPPTL | NIOSH | CDC](#) if you have concerns about counterfeit respirators.