

APPENDIX B: AGENCY'S RESPONSE TO THE REPORT


U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210



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MEMORANDUM FOR: CAROLYN R. HANTZ
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FROM: DOUGLAS L. PARKER 

SUBJECT: Response to Office of Inspector General Report: *COVID-19 OSHA's Enforcement Activities Did Not Sufficiently Protect Workers from Pandemic Health Hazards*

This is OSHA's responses to the OIG's Audit Report *COVID-19: OSHA's Enforcement Activities Did Not Sufficiently Protect Workers from Pandemic Health Hazards*. We take the OIG's results and recommendations seriously and appreciate the opportunity to address them below.

Result 1 – OSHA did not always issue citations to enforce the recording and reporting standard nor document its reasons.

The OIG found OSHA did not issue citations under its recording and reporting regulations in six out of the forty-one cases it sampled, and states "this occurred because CSHOs [(OSHA's Compliance Safety and Health Officers)] used their discretion whether to issue a citation." While OIG might take issue with the policy, OSHA was applying the applicable policy guidance for enforcement of recording requirements in place at the time and referenced in the report. OSHA's Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019, dated May 19, 2020, acknowledged employers' challenges in determining work-relatedness and provided for Compliance Safety and Health Officers (CSHOs) to use discretion in analyzing cases, based on employer efforts.

To the extent OIG determined staff did not adequately document the rationale for not issuing those six citations, as required in OSHA policy "Additional Guidance for Case File Documentation" (Memorandum, December 21, 2018), OSHA agrees documentation should have been included in the file. Therefore, OSHA agrees with Recommendations 1 and 2, which, recommend that OSHA "[p]rovide additional training to CSHOs to enforce the recording and reporting standard for fatalities," and "[u]pdate guidance or policy to include supervisory review of inspection files to ensure they contain adequate support for the reasons regarding citation issuance decisions before closing inspections[.]" respectively.

Result 2 – OSHA lacks complete information on COVID-19 infection rates at worksites.

The conclusion that OSHA lacked complete information on COVID-19 infection rates at worksites is accurate. The need for better information about the spread of COVID-19, especially earlier in the pandemic, has been a persistent issue for government and public health authorities. Fixing this issue, however, will require significant regulatory changes and investment in public and occupational health infrastructure as well as better data collection and analysis capabilities across a range of government agencies that go beyond OSHA’s ability to commit to finding a solution in the OIG audit process.

The OIG acknowledges that OSHA’s reporting regulation is limited to requiring employers to report *work-related* fatalities, inpatient hospitalizations, amputations, or loss of an eye. OSHA cannot expand its requirements without going through rulemaking. OSHA thus interprets the OIG’s suggestions in this result – that OSHA require reporting of *all* positive COVID-19 cases at a worksite, regardless of work relatedness, and require employers to notify employees of all positive COVID-19 cases – as a policy recommendation rather than an assessment of OSHA’s performance.

As to the recommendations related to this result, Recommendation 3 recommends that OSHA “[d]evelop a plan for a future pandemic or epidemic to collaborate with external agencies on worksite case data and to use this data to maximize rapid response and enforcement actions in worksites.” This recommendation is similar to a recommendation the OIG made in a separate audit – “*COVID-19: To Protect Mission Critical Workers, OSHA Could Leverage Inspection Collaboration Opportunities with External Federal Agencies*. OSHA certainly agrees it would be beneficial to have access to worksite case data. However, OSHA would need to explore the feasibility of this recommendation because it is dependent on worksite specific infectious disease case data being collected (a) in a form that allowed analysis and prioritization; (b) in a timely enough manner for effective intervention; and (c) by an agency willing to make it available to OSHA. Accordingly, to the extent OSHA can identify agencies with data that meet these criteria, OSHA agrees with this recommendation.

In Recommendation 4, OIG recommends that OSHA, “[a]s part of its infectious disease rulemaking, require all employers to notify employees of all known positive cases at the worksite.” OSHA notes, as reflected in its Regulatory Agenda, that the planned scope of the infectious disease rule is limited to health care and the social assistance sectors. While OSHA will consider the appropriate scope of the rule in the rulemaking process based on public comments, an infectious disease rule covering all employers would, as a practical matter, be a whole new rulemaking and significantly slow down the infectious disease rulemaking process, leaving healthcare and social assistance sector workers at risk, including at risk of hazards related to pandemics. Because of the scope and scale of this recommendation and feasibility concerns, the agency disagrees with Recommendation 4, but will take the recommendation of broad and inclusive reporting and employee notification into account in the proposed infectious disease rule.

Result 3 – OSHA closed inspections without ensuring employers demonstrated the alleged COVID-19 health hazards had been mitigated.

After conducting its review, the OIG found thirteen cases in which OSHA received partial responses to information requests. Based on this small number of cases, OIG concluded the reason OSHA only received partial responses to information requests was because, “although OSHA uses a tracking tool to monitor when it receives documentation to address citations, no similar tool exists to ensure OSHA receives, and reviews requested documentation when a citation is not issued.”

As the agency explained to OIG during the audit, an alleged hazard does not automatically mean the existence of a hazard or existence of a violation. If OSHA does not issue a citation, then there is no requirement for an employer to provide documentation of hazard abatement to OSHA. On any inspection, CSHOs determine whether a hazard and/or violation exists or does not exist based on additional factors, such as physical inspection and employee interviews, entirely separate from documentation. For example, if a CSHO requests documents a, b, and c during an inspection, receives documents a and b but concludes, as a health and safety professional, based on additional factors, that there is not a hazard or a violation, then document c is no longer needed or relevant and there is no reason to obtain it or track its request.

The OIG does not indicate that in the thirteen cases in which the employer partially responded to document requests, any hazard went unmitigated or violation uncited. Although OSHA is always open to recommendations to improve the efficiency or effectiveness of the inspection process, given that the audit has not shown the lack of a tracking system has a material impact on inspection effectiveness, OSHA is not persuaded it should prioritize creating and mandating use of a uniform tracking tool for all investigatory documentation requests. Accordingly, OSHA disagrees with Recommendation 5.