

TOSHA Complaints on the Rise

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What is TOSHA?

The Tennessee Occupational Safety and Health Act of 1972 ("TOSHA") codifies the occupational safety and health standards of the Tennessee Department of Labor and Workforce Development and incorporates the federal Occupational Safety and Health Act ("OSHA") standards. TOSHA can be found in Tennessee state law at *Tennessee Code Annotated* §50-3-101 *et seq.* and the Rules of Tennessee Department of Labor and Workforce Development, Chapter 0800-01-01 *et seq.* With limited exceptions, TOSHA applies to all employers and employees.

Under TOSHA, employers are required to provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious injury or harm.” *Tenn. Code Ann.* §5-3-105(1). Employers are also required to “comply with occupational safety and health standards or regulations promulgated.” *Tenn. Code Ann.* § 5-3-105(2).

Tennessee, as well as all other states, has been facing the issue of OSHA compliance during the COVID-19 pandemic and questions regarding whether COVID-19 is a “recognized hazard.”

COVID-19 TOSHA Complaints^[1]

Since March 1, 2020, the Tennessee Department of Labor and Workforce Development has received more than 300 employee complaints related to the COVID-19 pandemic. This represents a greater than doubling of complaints about dangerous work conditions than the same period last year.

Common complaints include a lack of personal protective equipment, essential businesses not abiding by state and federal guidelines and employees fearful of losing their jobs if they refuse to work in unsafe

conditions. However, most of the COVID-19 complaints TOSHA reported receiving cannot be resolved by the Department.

At this time, the Department has not interpreted their rules to apply to the current complaints surrounding the pandemic. Second, because Tennessee Governor Bill Lee's Executive Orders have only "recommended" action, TOSHA does not have a rule to reference and enforce. Executive Order 29, signed April 24, 2020, was Tennessee's first effort at reopening commerce by reopening restaurants to dine-in service. Executive Order 30, signed April 28, 2020, broadly reopened the state to business. However, the Order relies on Governor Lee's "trust[] and expect[ation]" for Tennessee citizens to limit non-essential activity and follow health guidelines. The Governor's Economic Recovery Group ("ERG") has also promulgated recommendations, not rules, for businesses.

TOSHA Inspections and Penalties

Following a complaint, the Department will determine whether there are reasonable grounds to believe a violation exists. If so, the Department will conduct an inspection of the employer. Importantly, such an inspection is not limited to the violation alleged in the complaint. That is, if the Department identifies other areas of concerns, the investigation may expand into those areas. If the Department determines an inspection is not warranted, the Department will send a letter to the complaining party stating there are no reasonable grounds to believe a violation or danger exists. Upon receipt, the complaining party may contest the letter and an employer may submit a written response. The Department may then hold an informal conference at which the Department's Commissioner will affirm, modify or reverse the previous decision to decline an inspection.

At the conclusion of an inspection, an inspection report is reviewed by the Department's Commissioner. If the Commissioner concludes the employer has violated a TOSHA law or Department rule, within six months the employer will be issued a citation. Citations require "abatement" within the reasonable time as prescribed within the citation. "Abatement" is defined in the Department's rules as "action by an employer to comply with a cited provision of the Act or a standard or regulation promulgated pursuant to the Act or to eliminate a recognized hazard identified by TOSHA during an inspection." *Rules of the Department of Labor and Workforce Development*, Rule 0800-01-04-.23(3)(a). If the Commissioner concludes a citation is not warranted, the decision is contestable through the informal conference procedure.

If the employer requires modification of the abatement date, the employer may file a petition for modification. An employer may also contest the citation with the Tennessee Occupational Safety and Health Review Commission.

The Department may order penalties even in cases in which the employer has immediately abated the violation or is in the process of abatement. The Department cannot order penalties for *de minimus* violations which have no direct or immediate relationship to safety or health. Penalties are determined

“with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the employer’s history of previous violations.” *Rules of the Department of Labor and Workforce Development*, Rule 0800-01-04-.16(2). An employer may contest a penalty.

Recommendations

The U.S. Department of Labor has issued guidance stating an employer should record workplace instances of COVID-19 as a recordable illness if:

- The case is a confirmed case of COVID-19;
- The case is work-related (as defined by 29 CFR 1904.5); and
- The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g., medical treatment beyond first aid, days away from work).

Although 29 CFR 1904 is not applicable in Tennessee, the Department considers Rule 0800-01-03 of the Rules of the Department of Labor and Workforce Development “virtually identical.”

In reference to the common COVID-19 dangerous workplace complaints listed above:

Personal Protective Equipment: The Department does not consider face masks to be personal protective equipment (PPE) and does not enforce rules regarding employer provision of masks, employer requirement of masks, or employee refusal of masks.

Failure to Abide by State or Federal Guidelines: According to an interview with the Nashville Post, the Department considers guidelines to be “recommendations” not “rules” and not enforceable by the Department.

Refusal to Return Work: The Department does not consider a refusal to return to work a TOSHA protected activity “unless the condition is immediately dangerous to life and death and there is no time to contact the appropriate regulatory agency.” The Department has indicated its intention to respond to COVID-19 complaining parties and request employer self-audits and written responses within 5 days.

Employers are encouraged to follow CDC guidelines and standard precautions. Gordon & Rees’ employment lawyers are prepared and available to provide guidance regarding requirements and recommendations for employers, with constantly-evolving requirements and recommendations issued for employer compliance.

Visit our [COVID-19 Hub](#) for ongoing updates.

[1] “*Workplace complaints double amid pandemic,*” Nashville Post, May 6, 2020.