

United States Senate
WASHINGTON, DC 20510

May 27, 2020

Scott S. Dahl
Inspector General
Office of Inspector General
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC. 20210

Dear Mr. Dahl:

We are writing to request that your office conduct an audit of the Occupational Safety and Health Administration's (OSHA) handling of inspections and citations during the coronavirus disease 2019 (COVID-19) pandemic, and the Department of Labor's (DOL) decision not to issue an OSHA Emergency Temporary Standard (ETS) to address the heightened risks for frontline workers during the pandemic.

Since President Trump's March 13, 2020 declaration of a national emergency,¹ the number of OSHA-issued citations has dropped by nearly 70%, and the inspection rate has also dropped dramatically.² An OSHA spokesperson reported the agency has not issued a single citation related to the COVID-19 pandemic.³

During this same period, thousands of essential workers have become sick, and many have died after being exposed to coronavirus at their workplaces. We are writing to seek an audit of OSHA's response to the pandemic, including an explanation for why citation and inspection numbers have dropped so dramatically during this national emergency, and whether DOL's refusal to issue an ETS is not in compliance with the law.

The Occupational Safety and Health Act (OSH Act) mandates that DOL "shall provide... for an emergency temporary standard to take immediate effect" if the Secretary of Labor "determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger."⁴ Essential workers continue to fall

¹ White House, "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," proclamation, March 13, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

² Politico, "OSHA enforcement dwindles as workers fall ill," Rebecca Rainey, May 1, 2020, <https://www.politico.com/newsletters/morning-shift/2020/05/01/osha-enforcement-dwindles-as-workers-fall-ill-787270>.

³ Politico, "Clash over government role in worker safety intensifies as businesses reopen," Rebecca Rainey, May 18, 2020, <https://www.politico.com/news/2020/05/18/clash-over-government-role-in-worker-safety-intensifies-as-businesses-reopen-265888>.

⁴ 29 USC 655 (c).

ill and die due to workplace coronavirus exposure. More than 9,000 health care workers fell ill with coronavirus between February 12 and April 9;⁵ dozens of grocery store workers have died due to COVID-19;⁶ and in New York City alone, more than 80 transportation workers have died.⁷ This is just a small sampling of the thousands of workers spanning dozens of industries who have become sick – often gravely so – on the job. It is beyond dispute that coronavirus constitutes a new hazard which poses grave danger to employees, and that current safety standards are inadequate to protect workers from this hazard.

Despite the growing numbers of sick and deceased essential workers, DOL has refused to issue an ETS. In response to a letter from a group of Senators requesting OSHA issue an emergency standard, DOL wrote:

OSHA is able to issue an Emergency Temporary Standard (ETS) when there is a minimum level of workplace safety practice that is necessary to protect workers, but is not being followed by employers. ...at this time, we see no additional benefit from an ETS in the current circumstances relating to COVID-19.⁸

OSHA's rationale is plainly faulty. There is no evidence that employers are sufficiently protecting workers—in fact, there is an abundance of evidence to the contrary. State and local governments have had to close essential businesses after they have failed to prevent and mitigate coronavirus outbreaks among employees. The city of Worcester, Massachusetts ordered a Walmart store to close on April 29, 2020, after more than 20 employees tested positive for coronavirus⁹ – the first of whom tested positive on April 8, 2020; now, more than 80 workers have tested positive.¹⁰ Kentucky Governor Andy Beshear ordered Amazon to close a warehouse in Shepherdsville after multiple employees tested positive for coronavirus.¹¹ Smithfield Foods did not suspend operations at their Sioux Falls facility, where more than 850 workers have

⁵ CDC, “Characteristics of Health Care Personnel with COVID-19 — United States, February 12–April 9, 2020,” *Morbidity and Mortality Weekly Report*, April 17, 2020, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e6.htm>.

⁶ The Washington Post, “‘It feels like a war zone’: As more of them die, grocery workers increasingly fear showing up at work,” Abha Bhattarai, April 12, 2020, <https://www.washingtonpost.com/business/2020/04/12/grocery-worker-fear-death-coronavirus/>.

⁷ Politico, “With death toll hitting 83, the MTA contemplates a memorial for its Covid fallen,” Dana Rubenstein, April 22, 2020, <https://www.politico.com/states/new-york/albany/story/2020/04/22/with-death-toll-hitting-83-the-mta-contemplates-a-memorial-for-its-covid-fallen-1279032>.

⁸ Letter to Senator Elizabeth Warren from Department of Labor Deputy Assistant Secretary Joe Wheeler, April 10, 2020, on file with the office of Senator Elizabeth Warren.

⁹ WVCB, “State corrects number of Worcester Walmart employees with COVID-19 to 23,” May 1, 2020, <https://www.wcvb.com/article/worcester-walmart-store-ordered-closed-after-41-employees-test-positive-for-coronavirus/32321303>.

¹⁰ Boston Herald, “81 coronavirus cases at Worcester Walmart, city says,” Sean Philip Cotter, May 2, 2020, <https://www.bostonherald.com/2020/05/02/81-coronavirus-cases-at-worcester-walmart-city-says/>

¹¹ WDRB, “Amazon plans April 1 restart for Kentucky warehouse with COVID-19 cases,” Chis Otts, March 26, 2020, https://www.wdrb.com/in-depth/amazon-plans-april-restart-for-kentucky-warehouse-with-covid-/article_43e34850-6f71-11ea-afe6-d37215a4cc4c.html.

become ill,¹² until South Dakota Governor Kristi Noem and Sioux Falls, South Dakota Mayor Paul TenHaken requested the facility close for 14 days.¹³

Furthermore, OSHA has largely abdicated its investigation and enforcement responsibilities for even *existing* standards. As of May 18, OSHA has only opened 310 COVID-19-related inspections, despite the agency receiving more than 3,990 COVID-19-related complaints.¹⁴ OSHA inspections dropped from on average 217 a day to 60 a day after the national emergency declaration, and the number of OSHA citations has decreased by nearly 70% compared with the prior two years.¹⁵ Stunningly, OSHA stated in an April 13, 2020 enforcement memo (which the agency recently announced will be rescinded¹⁶) that, in most cases, all workplaces other than healthcare and emergency response should not even receive on-site inspections in response to COVID-19-related complaints, but rather only a non-formal phone/fax inspection.¹⁷ While OSHA needs to ensure that its own inspectors are safe during this pandemic, the agency cannot do so by abdicating its mission to “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.”¹⁸

Additionally, OSHA stated in an April 16, 2020 memo that it may issue a citation in the case that “the employer cannot demonstrate any efforts to comply” with OSHA mandates, but urged Area Offices to take “attempts to comply in good faith . . . into strong consideration in determining whether to cite a violation.”¹⁹ A former OSHA official cautioned that these efforts erode enforcement efforts, potentially allowing employers off the hook for violations based on efforts as minimal as a phone call to seek protective equipment.²⁰ And despite a requirement for

¹² Associated Press, “Some meat plants reopen, but Trump order may not be cure-all,” Stephen Groves, May 1, 2020, <https://apnews.com/6c6711b16d68ebde1b2cd8060f431774>.

¹³ Washington Post, “Thousands of OSHA complaints filed against companies for virus workplace safety concerns, records show,” Peter Whoriskey, Jeff Stein, and Nate Jones, April 16, 2020, <https://www.washingtonpost.com/business/2020/04/16/osha-coronavirus-complaints/>.

¹⁴ Politico, “Clash over government role in worker safety intensifies as businesses reopen,” Rebecca Rainey, May 18, 2020, <https://www.politico.com/news/2020/05/18/clash-over-government-role-in-worker-safety-intensifies-as-businesses-reopen-265888>.

¹⁵ *Id.*

¹⁶ OSHA, “Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19),” memo, May 19, 2020, <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.

¹⁷ OSHA, “Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19),” memo, April 13, 2020, <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>. (“Complaints received during the initial months of the outbreak describe concerns related to lack of personal protective equipment (PPE), such as respirators, gloves, and gowns. OSHA has also received complaints expressing concern about a lack of training on appropriate standards and about possible COVID-19 illnesses in the workplace. In most cases, Area Offices should process complaints from non-healthcare and non-emergency response establishments as “non-formal phone/fax,” following the non-formal complaint and referral procedures in the Field Operations Manual (FOM), CPL 02-00-163, September 13, 2019, at www.osha.gov/enforcement/directives/cpl-02-00-163.”)

¹⁸ 29 USC 651 (b).

¹⁹ OSHA, “Discretion in Enforcement when Considering an Employer’s Good Faith Efforts During the Coronavirus Disease 2019 (COVID-19) Pandemic,” memo, April 16, 2020, <https://www.osha.gov/memos/2020-04-16/discretion-enforcement-when-considering-employers-good-faith-efforts-during>.

²⁰ Kaiser Health News, “OSHA Probing Health Worker Deaths But Urges Inspectors To Spare The Penalties,” Christina Jewett and Shefali Luthra, April 22, 2020, <https://khn.org/news/osha-probing-health-worker-deaths-but-urges-inspectors-to-spare-the-penalties/>.

employers to report on workplace deaths, “former OSHA leaders say the agency has not openly reminded hospitals and nursing homes to file such reports in recent weeks.”²¹

OSHA did release revised enforcement policies on May 19, 2020 announcing the agency is “increasing in-person inspections at all types of workplaces” and “enforc[ing] the recordkeeping requirements of 29 CFR 1904 for employee coronavirus illnesses for employers.”²² While we are hopeful that these changes, which went into effect on May 26, 2020,²³ will lead to increased coronavirus-related inspections and enforcement activity, we believe it is critical to audit OSHA’s efforts to date, and what impact the updated guidance may have.

Due to our grave concerns that OSHA is failing to meet its core mission of protecting worker health and safety during the COVID-19 pandemic, and failing to meet legal requirements to adopt an ETS to prevent additional, unnecessary worker illnesses and deaths, we ask that you open an audit of OSHA’s actions and decisions during the pandemic expeditiously. Thank you for your work and your consideration of this request.

Sincerely,

Elizabeth Warren
United States Senator

Tim Kaine
United States Senator

Bernard Sanders
United States Senator

Tammy Baldwin
United States Senator

Robert P. Casey, Jr.
United States Senator

Tammy Duckworth
United States Senator

²¹ *Id.*

²² OSHA, “U.S. Department of Labor Adopts Revised Enforcement Policies for Coronavirus,” press release, May 19, 2020, <https://www.osha.gov/news/newsreleases/national/05192020-0>.

²³ *Id.*