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# Michigan OSHA's COVID-19 Emergency Rules

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# Eric J. Conn

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**Eric J. Conn** is a founding partner at **Conn Maciel Carey LLP** and the Chair of the Firm's national OSHA • Workplace Safety Practice Group:

- Practiced for a decade w/ the former first General Counsel of OSHRC
- Focuses on all aspects of occupational safety & health law, representing employers in inspections and enforcement actions involving OSHA, CSB, MSHA & EPA
- Manages investigations of catastrophic industrial, construction, and manufacturing workplace accidents, explosions, and chemical releases
- Handles all aspects of OSHA litigation, from citation contests to criminal prosecutions, and negotiating settlements to minimize impact of OSHA enforcement on civil actions and operations
- Co-Chair of Conn Maciel Carey's COVID-19 Task Force
- Proud member of the Michigan Bar

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**Aaron R. Gelb** is a Partner in the Labor • Employment and OSHA • Workplace Safety Groups in **Conn Maciel Carey's** Chicago office:

- Represents employers in all aspects of the employer-employee relationship with a particular emphasis on workplace safety and employment litigation.
- Advises employers through inspections and enforcement actions involving fed. OSHA and state OSH programs, while managing the full range of litigation against OSHA
- Has extensive experience litigating employment discrimination claims in federal and state courts, having tried numerous cases to verdict while defending employers before the EEOC and state fair employment agencies nationwide

# Ashley D. Mitchell

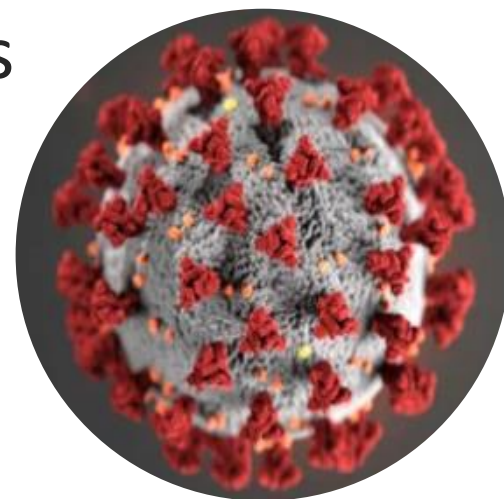
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**Ashley D. Mitchell** is an Associate in the Labor • Employment and OSHA • Workplace Safety Groups in **Conn Maciel Carey's** Chicago office:

- Represents and advises clients in a broad range of employment issues involving the employer-employee relationship including wage and hour disputes, Title VII discrimination claims, and compliance with the Americans with Disabilities Act (ADA)
- Represents employers during federal OSHA and State OSH Plan inspections and investigations
- Provides advice and guidance on responding to workplace safety complaints and litigating contests of OSHA citations
- Prior to joining Conn Maciel Carey, Ms. Mitchell worked at a highly regarded employee-side employment litigation boutique law firm

# Agenda

- ✓ Fed OSHA approach vs. State Plan States
- ✓ Gov. Whitmer's COVID-19 Executive Orders
- ✓ MIOSHA COVID-19 Emergency Rules
- ✓ MIOSHA COVID -19 FAQs





# **Fed OSHA vs. State OSH Plans**

## **Approach to COVID-19 Enforcement:**

### **A Tale of Two Systems**

# Initial COVID-19 Enforcement Response

- Relaxed enforcement posture (focus on compliance assistance)
- Enforcement focused on very high risk level industries/workplaces
- COVID-19 fatalities/imminent danger prioritized for inspections
- All other COVID-19 hazards addressed by NOAHs / RRI Requests

## Summary Data for Federal and State Programs - Enforcement

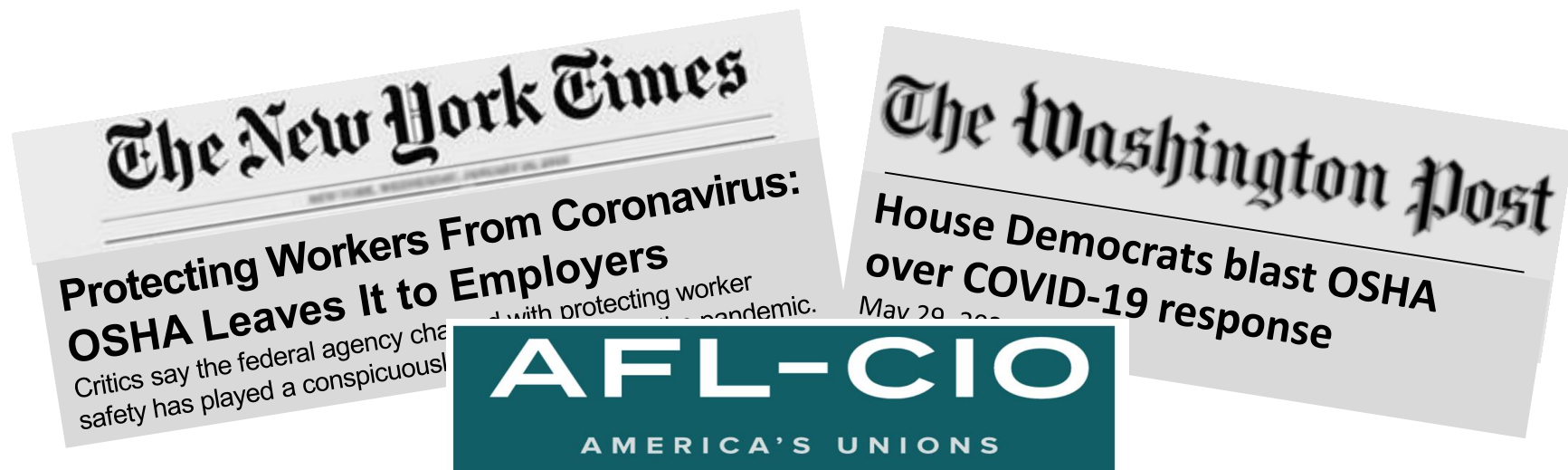
### Complaints, Referrals and Closed Cases (totals to date)

Date	Federal Summary			State Summary		
	Complaints	Referrals	Closed	Complaints	Referrals	Closed
10/08/2020	9,334	1,245	8,790	29,136	3,649	22,537

- **43,364 Employee Complaints/Referrals** (addressed almost entirely w/out inspection)



- OSHA was publicly flogged by worker safety activists, unions, and the media for its enforcement response



PRESS RELEASE

## AFL-CIO Sues OSHA for Emergency Temporary Standard to Protect Workers

May 18, 2020



This morning, the AFL-CIO [filed a petition](#) for a writ of mandamus in the U.S. Court of Appeals to compel the Occupational Safety and Health Administration (OSHA) to issue an emergency temporary standard (ETS) protecting U.S. workers against the coronavirus.

The petition demonstrates that thousands of workers have been infected on the job through exposure to infected patients, co-workers and unscreened members of the public. As the economy reopens and people return to work, person-to-person contact will increase and health experts predict the already shocking number of infections and deaths among workers will rise.



# Virginia Gov. Ralph Northam

*“Workers should not have to sacrifice their health and safety to earn a living, especially during an ongoing global pandemic. In the face of federal inaction, Virginia has stepped up to protect workers from COVID-19, creating the nation’s first enforceable workplace safety requirements.”*



# States Enforce Emergency Temporary COVID-19 Regulations

- Aggressive enforcement of Governors' E.O.s and Health Dept. Orders or General Duty Clause / IIPP in MI, NM, CA, MN & WA
- Virginia OSHA issued 1<sup>st</sup> COVID-19 infection control emergency temp. rule
- Emergency Temporary COVID-19 Rules coming soon in Oregon and Calif.
- Michigan OSHA just followed suit last week
- Emergency Standards set requirements:
  - Assess/categorize COVID-19 exposure risks;
  - Implement infection control plans
  - Promptly notify potentially agencies and exposed workers





# Michigan COVID-19 Executive Orders

## Gov. Whitmer's COVID-19 EOs

- May 18, 2020 – Gov. Whitmer, utilizing the Emergency Powers of Governor Act of 1945, issued EO 2020-91, Safeguards to Protect MI Workers from COVID-19
- Sept. 3 – State of Emergency and Emergency Orders extended by Gov. Whitmer
- The Michigan Legislature brought a lawsuit challenging Gov. Whitmer's authority to extend the Executive Orders
- Oct 12 – MI Supreme Court struck down the Emergency Orders, effective immediately

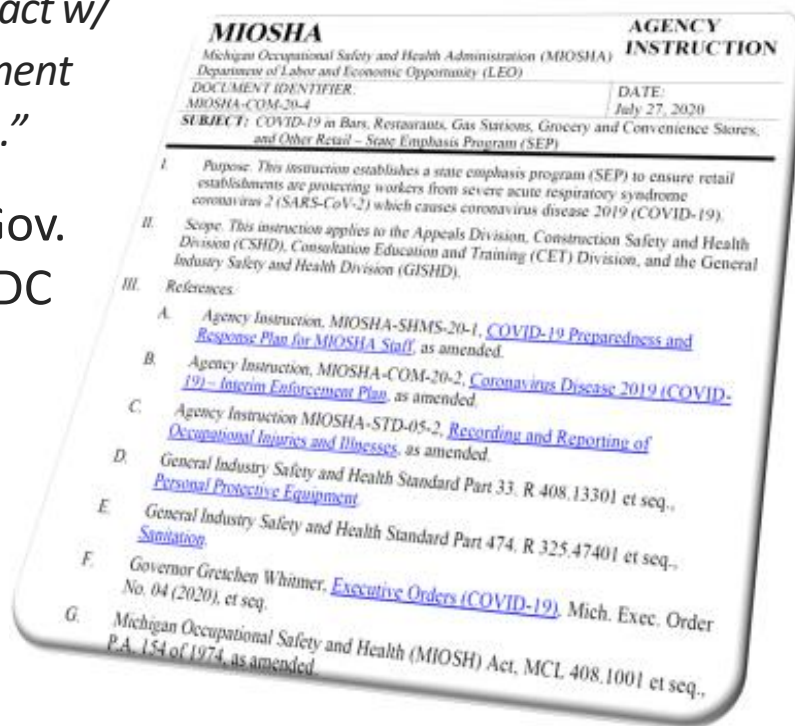
# MIOSHA Retail Emphasis Program

- In Aug., MIOSHA launched a State Emphasis Program on COVID-19 in Restaurants, Gas Stations, Grocery and C-Stores, and Other Retail

- The stated purposes of the SEP:

*“Increase MIOSHA’s presence in retail establishments to ensure workers are protected from SARS-CoV-2,” b/c “employees who come in contact w/ large numbers of people as a result of employment [like in retail] are at elevated risk of infection.”*

- SEP inspections evaluate adherence to Gov. Whitmer’s COVID-19 Exec. Orders and CDC and OSHA COVID-19 Guidance
- Targeting of businesses broken down as:
  - Restaurants and bars – 40%
  - Gas stations and convenience stores – 20%
  - Grocery stores – 20%
  - Other retail – 20%



# MIOSHA Retail Emphasis Program

“MIOSHA investigations determined that these employers were clearly not taking the appropriate steps to protect employees and their communities from the spread of COVID-19. Precautions are necessary to establish and maintain a work environment where everyone can return home safe and healthy.” – MIOSHA Director Pickelman

- **United Shore Financial Services in Pontiac – \$6,300 fine**

- Multiple employee complaints of outbreaks among employees
- Employer allowed employees to work in a shared office space w/out wearing face coverings
- Employer allowed employees to work w/in 6’ of one another without face coverings.
- The employer allowed newly hired employees to meet in a large group in excess of 120 people w/out wearing face coverings while seated w/in 6’ of one another
- Employees not notified w/in 24 hours of the employer learning a confirmed case visited the office

- **UPS distribution facility in Livonia - \$7,000 fine**

- Employer did not ensure sorters/loaders participated in a daily entry health screening
- Employer allowed employees to work w/in 6’ of one another when it was feasible not to
- Employer did not require employees face coverings when employees did not maintain 6’ separation
- Employer did not ensure sufficient cleaning measures of delivery vehicles
- Employer did not train employees on the elements of the preparedness and response plan
- Employer had not adequately implemented their COVID-19 preparedness and response plan





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# Michigan OSHA COVID-19 Emergency Rules



# MIOSHA Emergency Rulemaking

- Oct. 14 – 2 days after MI Supreme Court invalidated Gov. Whitmer’s Executive Orders, MIOSHA issued COVID-19 Emergency Rules (immediately effective)
- MIOSHA has a formal rulemaking process that requires a public comment period—bypassed due to emergency determination
- MI OSHA Director announced:

*“for the preservation of the public health, safety and welfare, [MI OSHA finds] a clear and convincing need exists for the promulgation of emergency rules” as provided in Sec. 48 of the APA, MCL 24.248 (w/out following notice and participation procedures required by Sec. 41-42 of the APA, MCL 24.241-24.242*

# 5 Steps to Compliance with the Rule

1. Conduct a workplace assessment (Assess)
2. Develop Exposure Control Plan (Plan)
3. Adopt Required Controls (Protect)
4. Train employees and managers (Train)
5. Maintain required records (Document)
  - Training
  - Screening
  - Notifications

# Determining Exposure Risk Level

- Tasks
- Work environment
- Presence of the virus
- # employees/size of area
- Working distances
- Duration and frequency of exposure
- Hazards encountered



## COVID-19 HAZARD ASSESSMENT

Evaluator:

Department/Division:

Date:

<i>Job Task/Employee/Job Category</i>			
<i>Description of potential exposure</i>	<i>Exposure level (H, M, or L)*</i>	<i>Engineering/Administrative Controls/Safe Work Practices</i>	<i>PPE</i>

<i>Job Task/Employee/Job Category</i>			
<i>Description of potential exposure</i>	<i>Exposure level (H, M, or L)*</i>	<i>Engineering/Administrative Controls/Safe Work Practices</i>	<i>PPE</i>

<i>Job Task/Employee/Job Category</i>			
<i>Description of potential exposure</i>	<i>Exposure level (H, M, or L)*</i>	<i>Engineering/Administrative Controls/Safe Work Practices</i>	<i>PPE</i>

I certify that the above hazard assessment was performed to the best of my knowledge and ability, based on the hazards present on this date.

\_\_\_\_\_ (signature)

\* Select "H" for "Very High" or "High" exposure levels; "M" for "Medium" exposure levels; or "L" for "Lower" exposure levels.

# Key Requirements of MIOSHA COVID-19 Emergency Rules

- Designate onsite COVID coordinator
- Provide free face covers and require use
- Signage & social distancing & barriers
- Remote work, prohibit sick employees
- Enhanced daily cleaning & for positive cases
- Employee health surveillance/screening
- Notify DOH & close contacts of positive case
- Comply with industry specific guidelines

# Training Requirements

- Infection control measures in the workplace;
- Proper use of PPE
- How to report symptoms or a positive/suspected case
- How to report unsafe working conditions
- Consider providing employees with an overview of the COVID-19 virus, symptoms, and means of transmission

# Records

- All employee training
- Employee and visitor screening
  - Keep a log, not a medical record
- Notifications made as required by the health surveillance portion of the Rule
  - reports to the Department of Health; and
  - those individuals who were in contact w/ a positive employee
- One-year retention period





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# FAQs about MIOSHA's COVID-19 Emergency Rules

## COVID-19 Workplace Safety Frequently Asked Questions

[Executive Rule 11\(1\) requires employers to maintain a record of the daily screening. What daily screening records must the employer maintain?](#)

[Executive Rule 11\(1\) requires employers to maintain a record of the daily screening. What is an acceptable "record"?](#)

[Executive Rule 5\(8\) says: The employer shall create a policy prohibiting in-person work for employees to the extent that their work activities can feasibly be completed remotely. What type of policy is required?](#)

[Executive Rule 7\(6\) requires face coverings in shared spaces, including during in-person meetings and in restrooms and hallways. When is a space considered a "shared space"?](#)

[Is an office area containing employees in cubicle-styled configurations a "shared space"? Are employees required to wear face coverings while inside their cubicle?](#)

[Who has to wear the non-medical grade face covering required by the Executive Rules and who has to provide them?](#)

# FAQ: Who Must Be Screened?

- Records of the daily screening must be kept for:
  - Each employee and contractor entering the workplace
  - Does not apply to customers or visitors, except casinos
- Healthcare employer musts have a documented daily screening protocol for all patients
  - health facilities or agencies
  - outpatient health-care facilities, clinics, primary care physician offices, dental offices, and veterinary clinics

# FAQ: What Record of Screening?

- Employers have two options:
  - Maintain copies of the completed questionnaires.
  - Maintain a log/report about the daily questionnaires.
    - Minimally the log/report would include date, employee/contractor identifier, and pass/fail indication.
    - Avoid employment + 30 years requirement.

# FAQ: What Sort of Remote Work Policy is Required?

- Thoughtful, reasoned policy why work completed in person cannot feasibly be completed remotely
- MIOSHA will not focus on evaluating the business' judgment of feasibility...
- Except for cases of obvious misapplication

# FAQ: What is a Shared Space?

- Rule 7(6) requires face coverings in shared spaces, including during in-person meetings and in restrooms and hallways.
- Space is “shared” when the space meets all these criteria:
  - Accessible to or utilized by multiple individuals at the same time
  - 6’ social distance cannot be maintained b/n individuals in the space
  - Space lacks physical barriers separating individuals from contact w/ each other during their presence in the space

## FAQ: Are Masks Required in Cubicles?

- Cubicle is not a shared space if it is configured to allow 6' distance b/n employees or has walls or barriers that separate employees from direct contact w/ other employees
- Employee in such a cubicle + 6' of distance or a physical barrier b/n other employees need not wear a mask
- Mask is required if employee in cubicle receives other employees or visitors in the space where there is less than 6' of distance or no physical barrier b/n employee and visitor
- Hallways or aisles b/n sections of cubicles are shared spaces
- Restrooms are also shared spaces



## **FAQ: Who is responsible for maintaining COVID Program records on a multi-employer worksite?**

- The key is to make sure all employees entering the work site are screened prior to starting work
- Each sub-contractor must still have a COVID-19 preparedness and response plan in place
- Each employer on the site is suggested to keep their own records
- When the inspection officer goes to a job site, the first thing the officer asks for is the preparedness and response plan and then the officer asks for accident prevention program (company's safety program)

## **FAQ: Are COVID Coordinators Required on Multi-Employer Worksites?**

- OK if GC is on site willing and able to assist sub-contractors
- If there is any time that GC is not onsite, sub-contractors must take on the role
- Coordinator must be present whenever site is open
- Tip: Have written agreement as to will be coordinator
  - Goal is to cover the sub-contractor if the agreement is the GC will be the coordinator
  - Documentation is key, especially with training (COVID-19 preparedness and response training)

## FAQ: On a construction site, can the GC or CM control evaluation of all work site procedures?

- If GC is in charge and willing to provide documentation to all sub-contractors, GC can plan and evaluate all tasks and procedures on site
- If GC is unwilling to provide documentation, sub-contractors are responsible
- If there is an agreement in writing that the subcontractor will perform the evaluation and the subcontractor does not, then *everyone* will be cited
- If the agreement is in writing that the GC will perform the evaluation and the GC does not perform the evaluation, then *only the GC* will be cited
- If there is an oral agreement for the GC to perform the evaluation and the GC does not, then generally everyone on the job site gets cited, unless one of the subcontractors has done it for its crew

# Conn Maciel Carey COVID-19 Task Force Resources

## COVID-19 TASK FORCE

As employers around the country grapple with the employment law and workplace safety implications of the 2019 Novel Coronavirus, "COVID-19," Conn Maciel Carey has formed a multi-disciplinary legal and regulatory task force comprised of our dedicated Workplace Safety, Labor and Employment Law, and Litigation attorneys to help our clients across all industries manage the multitude of pandemic-related issues employers are facing and prepare for potential litigation that is around the corner. We have produced a comprehensive database of resources to guide employers through this uncharted territory and the unique workplace challenges presented by the presence of a new health hazard in our nation's workplaces.

## Members of CMC's COVID-19 Task Force

Eric J. Conn OSHA Chair	Kara M. Maciel Labor and Employment Chair	Bryan A. Carey Partner	Nicholas W. Scala MSHA Chair
Kate M. McMahon OSHA Partner	Jordan B. Schwartz Labor and Employment Partner	Andrew J. Sommer Cal/OSHA and Employment Partner	Aaron R. Gelb OSHA and Employment Partner
Amanda Strainis-Walker OSHA Partner	Mark M. Trapp Labor and Employment Partner	Lindsay A. DiSalvo Associate	Megan S. Shaked Associate



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## COVID-19 FAQs for Employers

As the COVID-19 Pandemic continues to evolve, we have created an [extensive index of frequently asked questions](#) about HR, employment, and MSHA/OSHA related regulatory developments and guidance from federal agencies and the CDC. Conn Maciel Carey's COVID-19 Task Force will be updating our list of FAQs frequently, but please reach out to us for the most up to date information.

- [Employee Layoffs & Reduced Working Schedules](#)
- [The CARES Act](#)
- [Vacation, Paid Time Off & Sick Leave](#)
- [OSHA Recordkeeping and Reporting of COVID-19 Cases](#)
- [Temperature Checks for Employees](#)
- [Personal Protective Equipment](#)
- [Preventing Exposure in the Workplace](#)
- [Annual Physical Requirements](#)
- [Space Restrictions in Retail](#)
- [On-Site Inspection Activities](#)
- [Employer-Employee Confidentiality](#)
- [Emergency Infectious Disease Rule / NEP](#)
- [Offer Letters & Flexible Start Dates](#)
- [Employer Liability](#)



COVID-19 FAQs for Employers

## COVID-19 OSHA Recordkeeping and Reporting Resource Guide

CMC's COVID-19 Task Force has prepared a series of resources to assist employers in assessing whether a COVID-19 diagnosis for one of its employees is reportable to OSHA and/or recordable on the company's OSHA 300 Log, and if so, "how to" record it on the log. The toolkit includes a COVID-19 OSHA Reporting Flow Chart, a COVID-19 OSHA Recording Flow Chart, a one-pager on "How to record" COVID-19 cases on the log, and a detailed "Work-Relatedness Questionnaire." For more information about the OSHA reporting and reporting implications of COVID-19, [read this detailed article](#).



# Check out our blogs:

## the **OSHA DEFENSE** report



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## the **EMPLOYER DEFENSE** Report



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# the **EMPLOYER DEFENSE** report



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## ... **2020 Labor & Employment WEBINAR SERIES** ...

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California Employment Law Update for 2020

Wednesday, January 15th

Illinois and DC Area State Law Update

Tuesday, February 18th

Whistleblower / Retaliation Issues and Strategies

Wednesday, March 25th

Impact of the #MeToo Movement: Enforcement and State Law

Wednesday, April 22nd

Are Your Websites ADA Compliant? What Employers Need to Know

Wednesday, May 12th

Withdrawal Liability and Pensions

Wednesday, June 24th

The State of the Law Regarding Marijuana and Drug Testing

Wednesday, July 15th

OSHA and Labor & Employment Issues: Employee Discipline

Tuesday, August 19th

NLRB Update

Wednesday, September 16th

Conducting Background Checks: Federal, State and Local Law

Tuesday, October 13th

Federal Wage and Hour Update

Wednesday, November 11th

Delaying Retirement: Impact of America's Aging Workforce

Wednesday, December 16th

# the **OSHA** DEFENSE report



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## ... **2020 OSHA WEBINAR** series ...

OSHA's 2019 in Review and 2020 Forecast

Thursday, January 23rd

OSHA Settlement Tips and Strategies

Tuesday, February 25th

Strategies for Responding to Whistleblower Complaints

Wednesday, March 25th

Annual Cal/OSHA Update

Thursday, April 16th

E-Recordkeeping and Injury Reporting Update

Wednesday, May 20th

OSHA's PPE Standards - Top 5 Risks and Mistakes

Tuesday, June 16th

What You Need to Know About OSHA's General Duty Clause

Thursday, July 23rd

Employee Discipline - OSHA and Labor & Employment Issues

Wednesday, August 19th

Privileged Audits and Investigations and OSHA's Self-Audit Policy

Tuesday, September 22nd

Impact of the Election on OSHA

Thursday, October 22nd

Updates about OSHA's PSM Standard and EPA's RMP Rule

Tuesday, November 17th

Impact of America's Aging Workforce on OSHA and Employment Law

Wednesday, December 16th

# QUESTIONS?

