

What to Expect: OHS 2021

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A New Sheriff In Town ...

- Post-Transition all rules frozen that had not yet taken effect
 - Over 40 Exec Orders issued by President Biden, many impacting COVID-19 ETS, workplace safety and employment law, and environmental policy/regs
 - US Dist Ct upheld OSHA decision (Trump-era) to eliminate need for larger employers to submit 300/301 logs electronically
 - Trump Joint Employer rule rejected by US District Court
 - 11th Cir. rejected Trump-era version of MSHA workplace examination rule and affirm return to Obama-era version
 - Independent contractor rule (reclassifying workers) frozen & targeted for rescission
 - Major Trump rulemakings left incomplete – silica reboot (OSHA) and new silica rule (MSHA), workplace violence prevention
 - Trump Executive Orders (e.g. 1 in, 2 out) no longer in effect
- Biden DOL Secretary: Boston Mayor Marty Walsh
- Jim Frederick (USWA) - acting OSHA Asst Sec.
- MSHA leadership uncertain (Doug Palmer from CalOSHA?)

New OSHA/MSHA Penalties 1/15/2021

- OSHA & MSHA announced new penalties assessments on that date or later (even if citations were issued previously).
- The new maximum civil penalty amounts:
 - OSHA - Willful and repeat violations (\$136,532 max and \$9,753 min),
 - Serious (\$13,653) and Failure to Abate (\$13,653 per day)
 - MSHA - Maximum for flagrant violations (\$274,175),
 - maximum for regular company assessments and personal fines (\$74,775, with \$139 minimum),
 - late reporting of accidents (\$6,232 minimum),
 - failure to abate (\$8,101 per day), and
 - mandatory minimums:
 - Section 104d1 violations (\$2,493)
 - Section 104d2 orders (\$4,983)

OSHA “Top 10” Most-Cited Standards - 2020

1. Fall Protection (Gen. Req.) – 1926-501: 4,373 violations
2. Scaffolding – 1926.451: 2,392 violations
3. Hazard Communication – 1910.1200: 2,082 violations
4. Ladders – 1926.1053: 1,931 violations
5. Respiratory protection – 1910.134: 1,845 violations
6. Lockout/Tagout – 1910.147: 1,660 violations
7. Powered Industrial Trucks – 1910.178: 1,356 violations
8. PPE – Eye/Face Protection – 1926.102: 1,215 violations
9. Fall Protection (Training Req.) – 1926.503: 1,167 violations
10. Machine Guarding – 1910.212; 1,124 violations

➤ The top cited “willful violations” were issued for fall protection, confined spaces, requirements for protective systems in trenches, LOTO & machine guarding

AFL-CIO “Wish List”

- Stepping up enforcement will be critical to improve COVID protections, but ETS is vital
- 12/2020 was 50th Anniversary of OSH Act – time to “rebuild and restart”
- Regulatory priorities: infectious disease prevention, heat exposure, workplace violence rules
- Update of chemical exposures (PELs) – labor groups developing “chemicals policy agenda” to push
- Reinvigoration of OSHA Advisory Committees (ACCSH, NACOSH, MACOSH etc.)
- Unions point to state plan OSHAs that are getting ahead of the feds due to inaction during Trump years – creates inconsistent environment for worker protections
 - Legal issues with providing disparate protections across geographic lines for workers – particularly where 3rd Parties involved (as well as OSHA v. MSHA worksites)

COSH Agenda to “Rebuild OSHA”

- Nat’l Council for Occupational S&H (COSH) released agenda 2/3 to “rebuild OSHA” – endorsed by 100+ labor & community-based organizations – priority is COVID-19 ETS & strong enforcement
- Other steps recommended:
 - Strengthen & enforce safety laws and regulations
 - Don’t let employers silence workers
 - Listen to workers – give a seat at the table
 - Safe workplaces for all: equity & inclusion
 - Guarantee fair & just compensation for workers w/no special deals for corporations
 - Confront the workplace effects of climate change
 - Prevent chemical catastrophes & harmful exposures

OHS Outlook: New Administration

- Priority on COVID-19 ETS
 - 4 state OSHA agencies have COVID ETS, 10+ others regulate COVID in workplace via health depts (to circumvent federal OSHA)
- Increased use of criminal penalties (coordinate with DOJ/EPA)
 - Greater use of OSHA “egregious penalty” powers
 - Heightened whistleblower protection enforcement under Sec 11C and 29 CFR 1904.36 (modification of SOL for OSHA/MSHA?)
 - Increase use of employer injury/illness data for enforcement
 - More multi-employer citations (following OSHA court victory)
 - Renewed scrutiny of incentive programs and post-injury drug testing policies
 - Continued emphasis on “gig” workers (temps, IC classification)
- Likely rescission of recent policies issued by DOL that weaken enforcement generally and on COVID-19 in particular
- Launch additional OSHA National Emphasis Programs

Federal & State OSHA/MSHA Responses to COVID-19

- After issuing shifting/conflicting guidance during 2020, OSHA issued new guidance on 1/29/21, followed by a COVID-19 NEP and an OSHA C-19 enforcement plan on 3/12/21
 - 1/29/21: Employer Compliance Guidance: <https://www.osha.gov/coronavirus/safework>
 - 3/12/21 NEP Link: <https://www.osha.gov/enforcement/directives/dir-2021-01cpl-03>
 - 3/12/21 Enforcement Memorandum: <https://www.osha.gov/memos/2021-03-12/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>
- MSHA issued new guidance 3/10/21, tracks with OSHA/CDC elements but includes unique recommendations for mining work environments: <https://www.msha.gov/protecting-miners>
 - **Ventilation and PPE are key in mine environments underground**
- CalOSHA, MI-OSHA, OR-OSHA & Virginia OSHA have COVID ETS
 - Virginia **finalized permanent rule** on COVID-19 – effective 1/27/21
 - CalOSHA had ATD standard but now adopted ETS and working on additional rules and policy
 - OR-OSHA has proposed permanent COVID-rule to replace ETS (expiring 5/4)
 - MIOSHA adopted COVID ETS in October 2020 – in effect for 6 mo. (further action TBA)
- In total, 14+ states have adopted some form of worker safety protections in addition to separate executive orders requiring face masks in the workplace, which have been issued by some governors

2021 COVID-19 National Emphasis Program (NEP)

- NEP includes criteria to identify “high hazard industries” targeted for enforcement and compliance actions – in effect immediately (3/12/21) for one year -- can be amended or canceled depending on state of pandemic and info available
 - NEPs are evaluated using inspection data, Injury/Illness data, NIOSH reports, peer-reviewed literature, analysis of inspection findings and other available information sources
- Goal of NEP is to “significantly reduce or eliminate worker exposures to C-19 by targeting industries and worksites where employees may have a high frequency of close contact exposures” and controlling the associated health hazards
- C-19 NEP includes a focus on Whistleblower Protections & CSHOs will distribute educational information to workers on their rights under Section 11C & 29 CFR Part 1904
- NEP uses combination of inspection targeting, outreach to employers, and compliance assistance; if worksite is also under SST, the inspections will be concurrent and wall-to-wall
- OSHA NEP will include follow up inspections at sites visited in 2020 to monitor effectiveness of enforcement and guidance efforts
- ***2021 C-19 relief bill included \$100 MILLION in additional OSHA funding (above current \$592M level) with at least \$5M used for C-19 enforcement activities under the NEP and \$10M for Susan Harwood Grants***

COVID-19 National Emphasis Program

- NEP Inspections will focus on verifying that employers are taking correct actions to protect workers from C-19 and augments non-programmed activities such as follow-up inspections on complaints, referrals, and severe incident reports (all worksites eligible for unprogrammed events)
- Includes Precautions for CSHOs to take during on-site inspections (App. D)
 - Unprogrammed C-19 inspections will continue at worksites where employees have high frequency of “close contact” exposures (particularly in health care)
 - Area offices will continue to prioritize C-19 fatalities, complaints and referrals for inspection
 - Within 60 days, state plan states must provide notice of intent indicating whether already have substantially similar policy in place, intend to adopt new policies, or do not intend to adopt the directive
- Any other health or safety hazards observed (non-C-19) will be referred for later inspection (health) or will be cited if in plain view (safety)
- For programmed inspections, NEP will generate two “master lists”:
 - Master List 1 – Establishments having NAICS code in Appendices A or B
 - Master List 2 – Establishments in NAICS code in App A/B with ELEVATED illness rate as indicated by Form 300A

OSHA 2021 Enforcement Memorandum: Key Points

- OSHA will perform onsite inspections, identify C-19 hazard exposures, ensure appropriate controls are implemented, and address violations of OSHA standards and General Duty Clause (Sec 5(a)(1) of OSH Act)
- OSHA may use phone/video conferencing in lieu of F2F employee interviews to mitigate exposure, and will minimize in-person meetings with employers, and ask for docs to be provided electronically
- CSHOs who believe they've been exposed to C-19 during inspection must immediately report this to AD
- OSHA will continue to prioritize unprogrammed C-19 inspections as well as Programmed NEP Inspections
- OSHA will consider workplace risk levels using the following factors:
 - Extent of community transmission
 - Type of work activity
 - Ability of workers to wear face coverings and appropriate PPE
 - Extent to which employer follows OSHA standards and CDC guidance
 - Need to work in close contact with other people (within 6 feet for TOTAL of 15 minutes in 24-hour period)
 - May consider mitigation such as vaccines

Fall 2020 OSHA Reg Agenda

- Prerule Stage:
 - Prevention of workplace violence
 - Blood lead level modification for medical removal
 - Hazard Communication Standard Update (further alignment with GHS & codify enforcement policies)
- Proposed Rule Stage:
 - Powered Industrial Trucks (NPRM was due 12/20)
 - LOTO Update (NPRM due 4/21)
 - Tree Care Standard
 - Revisions to crystalline silica rule (reopen Table 1 & medical removal issue)
 - Drug Testing Program & Safety Incentives Rule
 - Mechanical Power Presses
 - Walking/Working Surface (modify stair rail requirements)
- Final Rule Stage: Procedures for Handling Whistleblower Complaints
- Potential upcoming issues – revisiting non-asbestiform minerals (OSHA/MSHA); revisiting diesel particulate issues (MSHA, surface & UG)

OSHA GHS/HazCom Proposed Rule

- OSHA announced proposed rule 2/8/2021 to update its Hazard Communication Standard to align with the 7th revision to the GHS system (will be in 2/16/2021 Federal Register)
- Proposed modifications fall into four categories:
 - Maintain alignment with GHS
 - Address issues coming to light since implementation in 2012
 - Alignment with Canada and other US trading partners
 - Improve alignment with other US agencies (DOT, EPA etc.)
- Comment deadline: April 19, 2021
 - Comments can be submitted to Docket OSHA-2019-0001 electronically through <https://www.regulations.gov>

MSHA Response to COVID-19

- President Biden's January 2021 Executive Order had timeline mandates for OSHA action on COVID-19, but MSHA was not given any enumerated requirements – told to consider whether ETS is needed, and issue ASAP
- MSHA issued new guidance 3/10/2021 which largely tracks with OSHA/CDC elements, but includes unique recommendations for mining work environments
 - <https://www.msha.gov/protecting-miners>
 - All work-related COVID cases involving medical treatment, DART or death must be reported to MSHA online (Form 7000-1) within 10 working days – miners and mine contractors
 - Recent reports indicate miners are at elevated risk of COVID complications due to prior exposures to coal, silica and other mine dusts, gases and chemicals
- MSHA is exempt from HIPAA as a public health agency and also has warrantless search authority, but has NO General Duty Clause
- MSHA directs mine operators & contractors to implement C-19 Prevention Programs at each mine.

MSHA & COVID-19

- MSHA guidance requires mine operators to adopt either stand-alone programs or additions to existing training and education programs, that include the following key elements:
 - Conducting a [hazard assessment](#) of the mine site – ventilation emphasis;
 - Appointing a mine coordinator who will be responsible for C-19 issues on operator's behalf and will regularly communicate with the miners' rep or directly with miners;
 - Identifying a combination of measures that limit the spread of COVID-19 in mine settings;
 - Recording and reporting C-19 infections and deaths;
 - Performing enhanced cleaning and disinfecting after people with suspected or confirmed C-19 have been in the mine setting;
 - Providing guidance on screening and testing, and consider making a C-19 vaccine available at no cost to eligible employees;
 - Adopting measures to ensure that miners who are infected or potentially infected are separated and sent home from the mine;
 - Educating and training miners on C-19 policies and procedures in formats and language that they understand;
 - Instructing miners who are infected or potentially infected to stay home and isolate or quarantine and isolating miners who show symptoms at work;
 - Considering protections for miners at higher risk for severe illness through supportive policies and practices; and
 - Implementing protections from retaliation for miners who raise COVID-19-related concerns.

Site-Specific Targeting Program Reboot

- SST - site-specific targeting inspection plan for non-construction workplaces with 20+ employees
 - Different DART rates for manufacturing and non-manufacturing are set as selection criteria to achieve a 50/50 representation on the list
- NEW SST Directive issued 12/16/20 updated core guidance and adds multiple tests to justify general industry inspections
 - The new test is based on employer's DART increases over a period of three CY if they are also above their sector's average in the metric
- Original SST DIRECTIVE NUMBER:18-01 (CPL 02) - Targeting is based on the data received from injury and illness information that employers submitted under 29 CFR 1904.41

DOL Policy: Enforcement Notices

- DOL 9/24/20 policy directed its agencies to limit press releases on enforcement actions to avoid “misleading” impressions that could “damage a company’s reputation” if the citation is later vacated or modified
- This impacts OSHA’s SVEP program as well as promotion of “significant” cases (\$100k+ or involving willful citations or fatal or catastrophic events) and COVID enforcement
- **Unless reversed**, OSHA/MSHA can only issue public info on enforcement action AFTER a court or other tribunal render judgment resulting in conviction, plea agreement, settlement or after the deadline to contest has passed
- 6/2020 American Economic Review study found press releases were more effective at reducing future violations than were on-site inspections – part of Obama OSHA’s “behavioral economics” approach

OHS Legislation in 117th Congress

- Appropriations for OSHA/MSHA FY 2021 under CR (continue current levels) but expect bump for FY 2022 – additional \$100M for OSHA through COVID-19 relief bill in 2021
- “Leftovers” from 116th Congress expected to be reintroduced
 - Protecting America’s Workers Act – omnibus “OSHA reform” legislation
 - Individual bills to hike criminal penalties for OSHA/MSHA
 - Legislation to expand federal OSHA jurisdiction over public sector
- *Center for Progressive Reform is preparing draft legislation to create a “private right of action” for workers who identify unsafe working conditions and sue employers directly over OSHA violations*
 - *Would eliminate current system that only allows OSHA or state OSHA agencies to take action for safety/health workplace violations*
 - *CPR also advocates “bounty system” where reporting workers would receive 30% of civil penalties recovered in safety cases, while 70% would be paid to OSHA (not Treasury) with attorney fees recovered for workers who bring successful cases*

Key OHS Legislation Under Consideration

- HR 1180 - Accurate Workplace Injury/Illness Records Restoration Act
 - Amend 6-mo SOL so it begins running when OSHA identifies a “continuing violation” instead of on the date the violation occurred
 - Reverses Congressional Review Act “disapproval” of Obama continuing viol. Rule
 - Requires OSHA to issue new rule on recordkeeping requirements as “continuing violation”
- HR 1195 -- Workplace Violence Prevention Act (limited to HC & SS) – 145 co-sponsors INCLUDING 6 GOP members!
- S. 184/HR 646 – Bipartisan legislation to require an MSHA COVID-19 ETS
- HR 2193 -- To direct Occupational Safety and Health Administration to issue an occupational safety and health standard to protect workers from heat-related injuries and illnesses

Medical Cannabis Update

- 36 states (plus DC and all US territories) have legalized medical cannabis
- 17 states (plus DC, Guam and CNMI) have now legalized recreational MJ
 - AZ, NJ, MT and SD added in 2020 – NY and VA in 2021
- A recent Gallup poll showed support for legalized marijuana at over 67 percent in the US
- Likely that Biden Admin and “blue” Congress will approve cannabis decriminalization as part of social justice initiatives
 - Sens. Booker, Wyden & Schumer issued joint statement 2/1/21 on comprehensive cannabis reform legislation – “Senate will make consideration of these reforms a priority”
 - Discussion draft expected early 2021 – restorative justice, protect public health, implement responsible taxes and regulations – input from stakeholders is critical!
 - Legalization will negate current ADA case law that does not protect medical users because it is “illegal” federally

Medical Cannabis & Worker's Comp

- The following states hold that employers must reimburse workers who are legal medical cannabis patients :
 - Arizona
 - Connecticut
 - Hawaii
 - Maine
 - Minnesota
 - New Hampshire
 - New Jersey
 - New Mexico
 - New York
 - Rhode Island
 - Vermont
- ✓ Mixed rulings in PA and MD
- ❖ The following states hold that employers do NOT have to reimburse workers:
 - Florida
 - Massachusetts
 - Michigan
 - North Dakota



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Questions???

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