

OSHA Reenergized: Increased COVID-19 Activity, Increased Inspections, More Money, and New Leadership – What's Next?

Presented by:

Eric E. Hobbs



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Minneapolis
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Oklahoma City
Orange County
Paris
Philadelphia
Phoenix
Pittsburgh
Portland (ME)
Portland (OR)
Raleigh
Richmond
Sacramento
San Antonio
San Diego
San Francisco
Seattle
St. Louis
St. Thomas
Stamford
Tampa
Toronto
Tucson
Washington D.C.

**Ogletree
Deakins**

OSHA in 2021/2022

- The new Secretary and Solicitor of Labor
- Who will lead OSHA?
- What may be in store for employers in 2021/2022?
- Will OSHA's approach to COVID-19 change?



Secretary and Solicitor of Labor

Secretary of Labor



Martin Walsh
Mayor of Boston

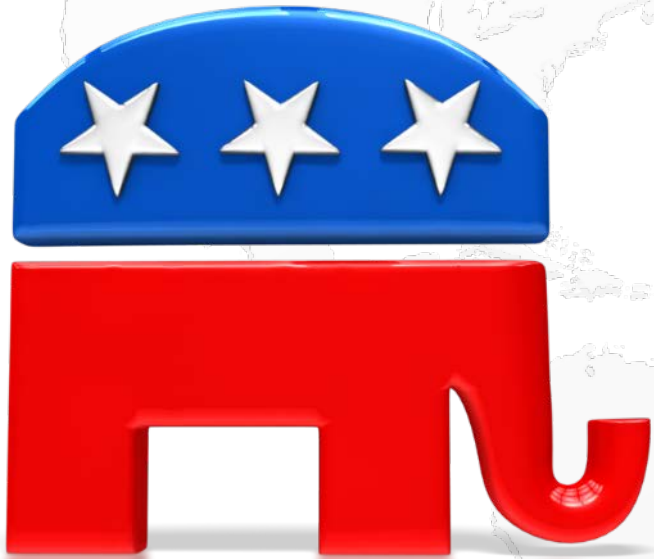
Solicitor of Labor



Seema Nanda

Senate Composition, 2021

50



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A stylized world map in light blue and beige tones serves as the background for the slide.

Assistant Secretary for Occupational Safety and Health

Assistant Secretary of Labor – OSHA



NOMINEE – Doug Parker
Cal/OSHA

In the Meantime ...



DEPUTY ASSISTANT— Jim
Frederick
United Steelworkers (ret.)



The Return of Public Shaming

OSHA, circa 2009-16



OSHA News Release - Region 3

U.S. Department of Labor

Please note: Information in some news releases may be out of date or may no longer reflect OSHA policy.

Region 3 News Release: 12-2426-NEW (osha 12-133)

Dec. 27, 2012

Contact: Leni Fortson Joanna Hawkins

Phone: 215-861-5102 215-861-5101

Email: uddyback-fortson.lenore@dol.gov hawkins.joanna@dol.gov

US Labor Department's OSHA fines Union, NJ, contractor \$41,580 for repeat electrical hazards at Fort Lee, NJ, work site

UNION, N.J. – The U.S. Department of Labor's Occupational Safety and Health Administration has cited Bender Enterprises Inc., based in Union, with three repeat violations for continuing to expose workers to electrical hazards at a Fort Lee work site. OSHA's June investigation was initiated following a referral from the Fort Lee Police Department when a worker was injured while servicing an electrical panel. Proposed penalties total \$41,580.

The repeat violations include failing to protect workers from contact with live electrical parts, provide eye and face protection from electric arcs, flashes or flying objects, and provide insulated tools and equipment for workers exposed to energized conductors or circuit parts. Similar violations were cited at the Upper Saddle River work site in 2008.

"By failing to address these hazards, Bender Enterprises continues to unnecessarily put its workers in harm's way," said Lisa Levy, director of OSHA's Hasbrouck Heights Area Office. "Employers will be held legally responsible for jeopardizing the safety and health of workers."

Bender Enterprises has 15 business days from receipt of the citations and penalties to comply, request an informal conference with the OSHA area director, or contest the findings before the Independent Occupational Safety and Health Review Commission.

To ask questions, obtain compliance assistance, file a complaint, or report workplace hospitalizations, fatalities or situations posing imminent danger to workers, the public should call OSHA's toll-free hotline at 800-321-OSHA (6742) or the agency's Hasbrouck Heights office at 201-288-1700.

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees. OSHA's role is to ensure these conditions for America's working men and women by setting and enforcing standards, and providing training, education and assistance. For more information, visit <http://www.osha.gov>.

###



“Shaming” Press Releases

- “...continues to unnecessarily put its workers in harm’s way”
- “Something is seriously wrong when an employer repeatedly disregards safety...”
- “OSHA will not tolerate a company’s repeated negligence...”



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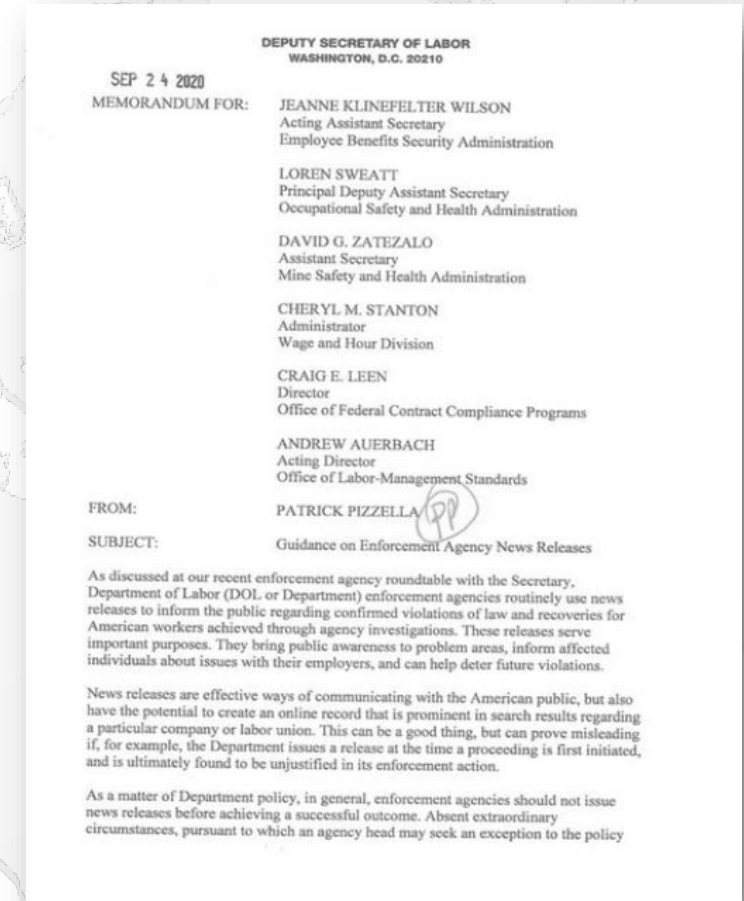
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September 24, 2020, DOL Internal Directive

- Only appropriate to issue press release:
 - After a court or other tribunal has rendered judgment or issued a decision;
 - After a conviction or plea agreement has been obtained;
 - After an agency has entered a settlement or conciliation agreement with the named party regarding remedies or the payment of a penalty; and
 - After the time for contesting a finding (such as a citation) has elapsed and the party hasn't contested or requested to negotiate



The Johnson Study, Spring 2020

- 1 shaming press release = 210 OSHA inspections

<https://www.aeaweb.org/articles?id=10.1257/aer.20180501>



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Seriously?



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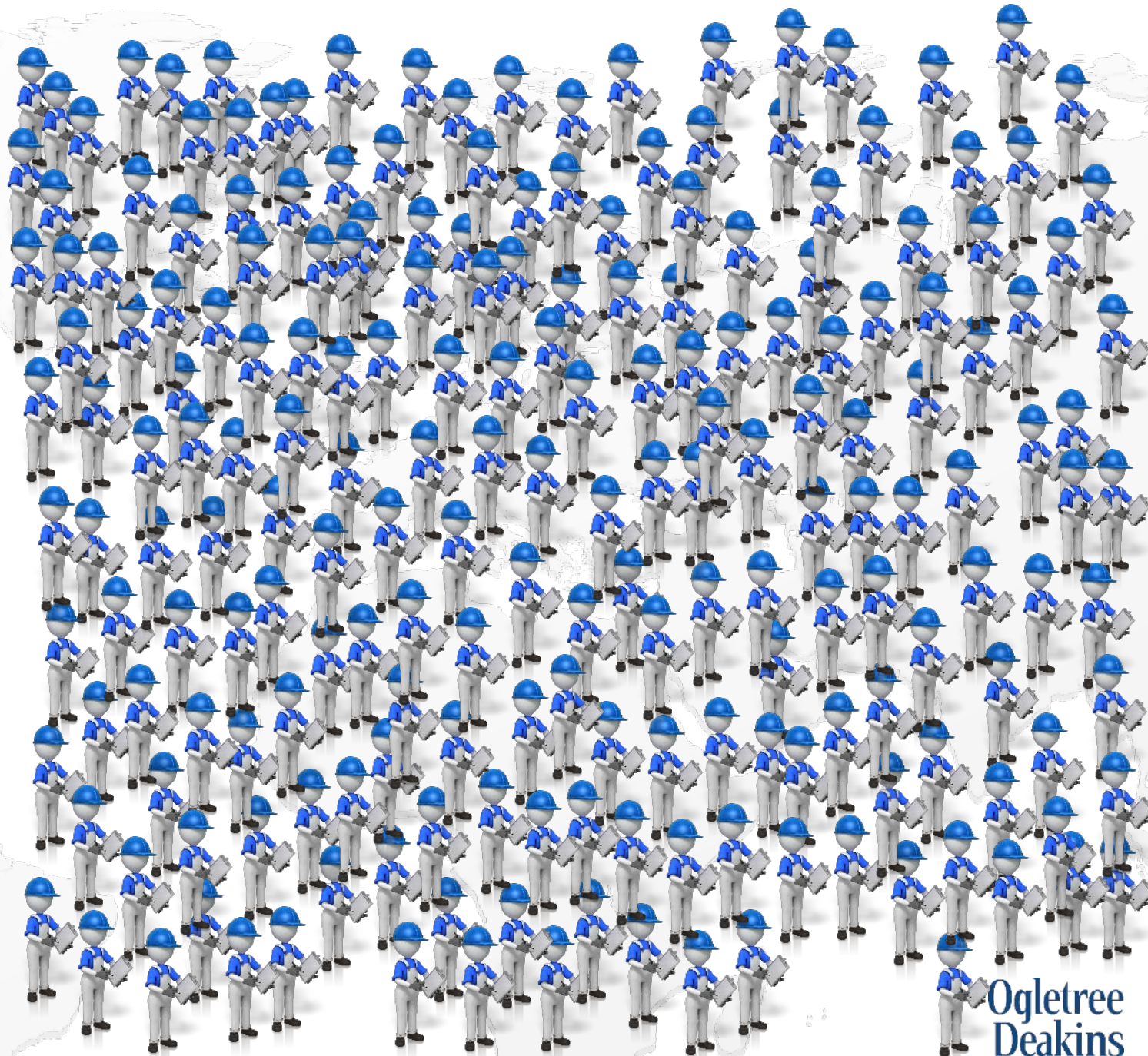
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The Battle Over Electronic Reporting

2016 Final Rule

- 250+: Submit all 300, 301, and 300A logs
- 20-249: Submit 300A only



January 2019 Amendment

- 250+: Submit 300A only
- 20-249: Submit 300A only



2021 Regulatory Agenda

- Proposed Rule – “Improve Tracking of Workplace Injuries and Illnesses”
 - - Old proposal renewed?
 - - Name a give-away?



The Lawsuit



PUBLICCITIZEN

Case 1:19-cv-00166-TJK Document 1 Filed 01/25/19 Page 1 of 11

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC CITIZEN HEALTH
RESEARCH GROUP,
1600 20th Street NW
Washington, DC 20009,

AMERICAN PUBLIC HEALTH
ASSOCIATION,
800 I Street NW
Washington, DC 20001,

and,

COUNCIL OF STATE AND
TERRITORIAL EPIDEMIOLOGISTS,
2872 Woodcock Boulevard
Suite 250
Atlanta, GA 30341,

Plaintiffs,

v.

R. ALEXANDER ACOSTA, Secretary,
United States Department of Labor,
200 Constitution Ave. NW
Washington, DC 20210,

UNITED STATES DEPARTMENT
OF LABOR,
200 Constitution Ave. NW
Washington, DC 20210,

and,

OCCUPATIONAL SAFETY
AND HEALTH ADMINISTRATION,
200 Constitution Ave. NW
Washington, DC 20210,

Defendants.

Civil Action No. 19-cv-166

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

The Lawsuit

2. The Rollback Rule should be declared unlawful and set aside because OSHA has failed to provide a reasoned explanation for its change in position, failed to adequately consider comments submitted in opposition to the change, and relied on considerations that have no sound basis in law. OSHA's action, findings, and conclusions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. *See* 5 U.S.C. § 706(2)(A).

Judge Kelly's Ruling

Upon consideration of the record in this case, including the Complaint, ECF No. 1, Plaintiffs' Motion for Summary Judgment, ECF No. 16, Defendants' Motion to Dismiss, ECF No. 17, and the legal memoranda and other papers submitted by the parties, as well as the applicable law, and for the reasons set forth in a Memorandum Opinion to be issued by the Court within the next thirty days, it is hereby **ORDERED** that Defendants' Motion to Dismiss is **GRANTED** and Plaintiff's Motion for Summary Judgment is **DENIED**.



The Return of Rulemaking

Rulemaking, 2016

DOL/OSHA	Prerule Stage	Bloodborne Pathogens	1218-AC34
DOL/OSHA	Prerule Stage	Combustible Dust	1218-AC41
DOL/OSHA	Prerule Stage	Preventing Backover Injuries and Fatalities	1218-AC51
DOL/OSHA	Prerule Stage	Shipyards Fall Protection--Scaffolds, Ladders and Other Working Surfaces	1218-AC85
DOL/OSHA	Prerule Stage	Communication Tower Safety	1218-AC90
DOL/OSHA	Prerule Stage	Emergency Response and Preparedness	1218-AC91
DOL/OSHA	Prerule Stage	Mechanical Power Presses Update	1218-AC98
DOL/OSHA	Prerule Stage	Powered Industrial Trucks	1218-AC99
DOL/OSHA	Prerule Stage	Lock-Out/Tag-Out Update	1218-AD00
DOL/OSHA	Prerule Stage	Revocation of Obsolete Permissible Exposure Limits (PELs)	1218-AD01
DOL/OSHA	Prerule Stage	1-Bromopropane (1-BP) Standard	1218-AD05
DOL/OSHA	Prerule Stage	Noise in Construction	1218-AD06
DOL/OSHA	Prerule Stage	Preventing Workplace Violence in Healthcare	1218-AD08
DOL/OSHA	Prerule Stage	Occupational Exposure to Styrene	1218-AD09
DOL/OSHA	Prerule Stage	Blood Lead Level for Medical Removal	1218-AD10
DOL/OSHA	Prerule Stage	Updating Requirements for the Selection, Fit Testing, and Use of Hearing Protection Devices	1218-AD11
DOL/OSHA	Proposed Rule Stage	Infectious Diseases	1218-AC46
DOL/OSHA	Proposed Rule Stage	Standards Improvement Project IV	1218-AC67
DOL/OSHA	Proposed Rule Stage	Amendments to the Cranes and Derricks in Construction Standard	1218-AC81
DOL/OSHA	Proposed Rule Stage	Update to the Hazard Communication Standard	1218-AC93
DOL/OSHA	Proposed Rule Stage	Quantitative Fit Testing Protocol: Amendment to the Final Rule on Respiratory Protection	1218-AC94
DOL/OSHA	Proposed Rule Stage	Crane Operator Qualification in Construction	1218-AC96
DOL/OSHA	Proposed Rule Stage	Tree Care Standard	1218-AD04
DOL/OSHA	Proposed Rule Stage	Cranes and Derricks in Construction: Exemption Expansions for Railroad Roadway Work	1218-AD07
DOL/OSHA	Proposed Rule Stage	Technical Corrections to 16 OSHA Standards	1218-AD12
DOL/OSHA	Proposed Rule Stage	Puerto Rico State Plan	1218-AD13

Rulemaking, 2017-2021

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DOL/OSHA	Proposed Rule Stage	Occupational Exposure to Crystalline Silica; Revisions to Table I in the Standard for Construction	1218-AD18
DOL/OSHA	Proposed Rule Stage	Welding in Construction Confined Spaces	1218-AD23
DOL/OSHA	Proposed Rule Stage	Drug Testing Program and Safety Incentives Rule	1218-AD24
DOL/OSHA	Proposed Rule Stage	Personal Protective Equipment in Construction	1218-AD25
DOL/OSHA	Proposed Rule Stage	Powered Industrial Trucks Design Standard Update	1218-AD26
DOL/OSHA	Proposed Rule Stage	Walking Working Surfaces	1218-AD28
DOL/OSHA	Proposed Rule Stage	Occupational Exposure to Crystalline Silica: Revisions to Medical Surveillance Provisions for Medical Removal Protection	1218-AD31
DOL/OSHA	Final Rule Stage	Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records	1218-AC95
DOL/OSHA	Final Rule Stage	Cranes and Derricks in Construction: Exemption Expansions for Railroad Roadway Work	1218-AD07
DOL/OSHA	Final Rule Stage	Exposure to Beryllium to Review General Industry Provisions	1218-AD20
DOL/OSHA	Final Rule Stage	Procedures for the Handling of Retaliation Complaints under the Taxpayer First Act	1218-AD27
DOL/OSHA	Final Rule Stage	Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors	1218-AD29
DOL/OSHA	Final Rule Stage	Procedures for Handling of Retaliation Complaints Under the Whistleblower Protection Statutes	1218-AD30
DOL/OSHA	Final Rule Stage	Revision of 29 CFR 1912, Advisory Committee Standards	1218-AD33

Priority I



Other Priorities – Infectious Disease



Other Priorities - Heat



News Release from OSHA

Having trouble viewing this email? [View it as a Web page.](#)



News Release

U.S. Department of Labor | September 20, 2021

US Department of Labor announces enhanced, expanded measures to protect workers from hazards of extreme heat, indoors and out

Part of an interagency Biden-Harris administration effort to protect workers, communities

WASHINGTON – To combat the hazards associated with extreme heat exposure – both indoors and outdoors – the White House today announced enhanced and expanded efforts the U.S. Department of Labor is taking to address heat-related illnesses.

As part of the [Biden-Harris administration's interagency effort](#) and commitment to workplace safety, climate resilience, and environmental justice, the department's [Occupational Safety and Health Administration](#) is initiating enhanced measures to protect workers better in hot environments and reduce the dangers of exposure to ambient heat.

While heat illness is largely preventable, and commonly under-reported, thousands of workers are sickened each year by workplace heat exposure. Despite widespread under-reporting, 43 [workers died](#) from heat illness in 2019, and at least 2,410 others suffered serious injuries and illnesses. Increasing heat precipitated by climate change can cause lost productivity and work hours resulting in large wage losses for workers. The Atlantic Council's Adrienne Arsht-Rockefeller Foundation Resilience Center [estimates](#) the economic loss from heat to be at least \$100 billion annually – a number that could double by 2030 and quintuple by 2050 under a higher emissions scenario.

To emphasize its concern and take necessary action, OSHA is implementing [an enforcement initiative](#) on heat-related hazards, developing a [National Emphasis Program](#) on heat inspections, and launching a rulemaking process to develop a workplace heat standard. In addition, the agency is forming a [National Advisory Committee on Occupational Safety and Health](#) Heat Injury and Illness Prevention Work Group to provide better understanding of challenges and to identify and share best practices to protect workers.

“Throughout the nation, millions of workers face serious hazards from high temperatures both outdoors and indoors. Amid changing climate, the growing frequency and intensity of extreme heat events is increasing the dangers workers face, especially for workers of color who disproportionately work in essential jobs in tough conditions,” said U.S. Department of Labor Secretary Marty Walsh. “As Secretary of Labor, my priority is to make sure we are taking appropriate action to keep workers healthy and safe on the job.”

Other Priorities - Heat

September 1, 2021, Standard Interpretation:

- During heat-related inspections, CSHOs should;
- Review OSHA 300 Logs for any entries indicating heat-related illness(es),
- Review injury and illness reports and obtain any records of emergency room visits and/or ambulance transport, even if hospitalizations did not occur,
- Interview workers for reports of headache, dizziness, fainting, dehydration, or other symptoms that may indicate heat-related illnesses,
- Review employer's plan to address heat exposure, including acclimatization procedures (especially for new and returning workers), work-rest schedules, access to shade and water (with electrolytes when needed), and any training records associated with implementing a heat illness prevention program,
- Document, where possible, the heat index on the OSHA-NIOSH Heat App, using the screen save feature on a mobile phone or tablet,

Other Priorities - Heat

- Identify conditions and activities relevant to heat-related hazards. These can include, but are not limited to:
 - Potential sources of heat-related illnesses (e.g., working in direct sunlight, a hot vehicle, or areas with hot air, near a gas engine, furnace, boiler or steam lines),
 - WBGT calculations and/or other temperature measurements,
 - Heat advisories, warnings or alerts,
 - The use of heavy or bulky clothing or equipment,
 - The types of activities performed by the employees and whether those activities can be categorized as moderate, heavy or very heavy work,
 - The length of time in which a worker is continuously or repeatedly performing moderate to strenuous activities,
 - Heat-related illnesses among new workers,
 - The presence of any recent vacation time or breaks in employment prior to complaints of heat-related symptoms, and
 - The availability of rest breaks, water and shade on site.

Other Possible Priority





Injury
Illness &
Prevention
Program



Other (Possible) Priorities

- Lockout/Tagout and Hazard Communication Updates
- Tree Care
- Silica (revise medical surveillance/removal provisions)
- Powered Industrial Trucks (design)
- Lead (blood level for medical removal)

A stylized world map with a light blue background. The continents are outlined in a darker blue, and the oceans are a lighter shade of blue. The map is centered on the Atlantic Ocean.

COVID-19 and OSHA

June 10, 2021

Disclaimer: This final rule has been submitted to the Office of the Federal Register (OFR) for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the final rule may vary slightly from the published document if minor technical or formatting changes are made during the OFR review process. Only the version published in the Federal Register is the official final rule.

Subpart U — COVID-19 Emergency Temporary Standard

Subpart U Table of Contents

1910.502 Healthcare

1910.504 Mini Respiratory Protection Program

1910.505 Severability

1910.509 Incorporation by Reference

Authority: 29 U.S.C. 653, 655, and 657; Secretary of Labor's Order No. 8-2020 (85 FR 58393); 29 CFR part 1911; and 5 U.S.C. 553.

§ 1910.502 Healthcare.

(a) *Scope and application.*

- (1) Except as otherwise provided in this paragraph, this section applies to all settings where any employee provides healthcare services or healthcare support services.
- (2) This section does not apply to the following:
 - (i) the provision of first aid by an employee who is not a licensed healthcare provider;
 - (ii) the dispensing of prescriptions by pharmacists in retail settings;
 - (iii) non-hospital ambulatory care settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings;
 - (iv) well-defined hospital ambulatory care settings where all employees are fully vaccinated and all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings;

1

ETS Regulatory Text (44 pages)

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BILLING CODE: 4510-26-P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. OSHA-2020-0004]

RIN 1218-AD36

Occupational Exposure to COVID-19; Emergency Temporary Standard

AGENCY: Occupational Safety and Health Administration (OSHA), Department of Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is issuing an emergency temporary standard (ETS) to protect healthcare and healthcare support service workers from occupational exposure to COVID-19 in settings where people with COVID-19 are reasonably expected to be present. During the period of the emergency standard, covered healthcare employers must develop and implement a COVID-19 plan to identify and control COVID-19 hazards in the workplace. Covered employers must also implement other requirements to reduce transmission of COVID-19 in their workplaces, related to the following: patient screening and management; Standard and Transmission-Based Precautions; personal protective equipment (PPE), including facemasks or respirators; controls for aerosol-generating procedures; physical distancing of at least six feet, when feasible; physical barriers; cleaning and disinfection; ventilation; health screening and medical management; training; anti-retaliation; recordkeeping; and

1

ETS Preamble (916 pages)

COVID-19 / Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

OSHA will update this guidance over time to reflect developments in science, best practices, and standards.

Guidance posted **January 29, 2021**

Summary of changes **June 10, 2021**

- Focus protections on unvaccinated and otherwise at-risk workers
- Encourage COVID-19 vaccination
- Add links to guidance with the most up-to-date content

On this Page

Executive Summary
Purpose
About COVID-19

What Workers Need To Know about COVID-19 Protections in the Workplace
The Roles of Employers and Workers in Responding to COVID-19

Appendix: Measures Appropriate for Higher-Risk Workplaces with Mixed-Vaccination Status Workers

Updated OSHA Guidance (~111 pages)

OSHA COVID-19 Emergency Temporary Standard for Healthcare

- Exposure Assessment Plans
- Infection Control Plans
- Mandatory No-exception Protocols
- Employee Notification
- Employee Testing
- Mandatory Training

OSHA Updated Guidance for All Other Industries

COVID-19 / Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

OSHA will update this guidance over time to reflect developments in science, best practices, and standards.

Guidance posted **January 29, 2021**

Summary of changes **June 10, 2021**

- Focus protections on unvaccinated and otherwise at-risk workers
- Encourage COVID-19 vaccination
- Add links to guidance with the most up-to-date content

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The Roles of Employers and Workers in Responding to COVID-19

Appendix: Measures Appropriate for Higher-Risk Workplaces with Mixed-Vaccination Status Workers

Revised Guidance for Non-Healthcare Employers

- OSHA revised guidance on August 13, 2021
 - Prior to the revisions, CDC stated that fully-vaccinated employees need not wear masks or socially distance



Revised Guidance for Non-Healthcare Employers

- OSHA revised guidance on August 13, 2021
 - Then ...
 - Delta variant showed up
 - CDC reversed course and recommended masking/social distancing in all “public indoor spaces”
 - OSHA followed suit



OSHA Guidance – Foreshadowing?

- Vaccination: Vaccines are the “most effective way to protect against severe illness or death”
- “OSHA suggests that employers consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing – in addition to mask wearing and physical distancing – if they remain unvaccinated”
- Limits of vaccines
 - Fully vaccinated can transmit COVID-19
 - “At risk” vaccinated workers may not respond as well to the vaccine
 - Vaccinated workers can contract COVID-19, but likely to be less severe

OSHA Guidance – Foreshadowing?

- What is OSHA recommending?
 - Facilitate vaccination: Grant paid time off (PTO) to get the vaccine and recover; consider offering vaccines at the workplace
 - Instruct workers who are infected or unvaccinated workers with close contact with infected person to stay home
 - Fully vaccinated – test 3-5 days after exposure and wear mask for 14 days or unless negative test result
 - Unvaccinated – test immediately and then 5-7 days later or immediately if symptoms develop
 - “Ensure that absence policies are non-punitive”



OSHA Guidance – Foreshadowing?

- Training on COVID-19 and workplace policies
- “Suggest or mandate that unvaccinated customers, visitors, or guests” wear masks in areas of high community transmission
- Maintain ventilation systems
- Routine cleaning and disinfection
- Record and report work-related COVID-19 cases and deaths
- Implement protections from retaliation and set up an anonymous process for employees to raise concerns about COVID-19 policies



OSHA Guidance – Foreshadowing?

- Record and report work-related COVID-19 cases and deaths
- And, of course: Implement protections from retaliation and set up an anonymous process for employees to raise concerns about COVID-19 policies



OSHA Guidance – Foreshadowing?

- “Higher risk workplaces with mixed-vaccination status workers” – What does this mean?
 - Unvaccinated or at-risk workers who must be in close contact or working in poorly ventilated spaces
 - Employees sharing “employer-provided transportation”
 - “Frequent contact” with the community, especially where there is high community transmission
 - Communal housing or living quarters
- Examples: poultry/meat processing; “high volume” retail; “agricultural processing settings”

OSHA Guidance – Foreshadowing?

- “Higher risk workplaces”
 - Stagger break times and arrival/departure times
 - Remind workers about physical distancing with floor markings and signs
 - Require workers to wear masks
 - Improve ventilation
 - Ask (or require) customers and visitors to wear masks



OSHA Guidance – Foreshadowing?

- Masking/Social Distancing: Vaccinated workers should “wear a mask in public indoor settings if they are in an area of substantial or high transmission” (and can choose to wear masks regardless of infection rates)
- Unvaccinated should wear masks unless they are working outdoors
- Workers should socially distance unless fully vaccinated and not “at risk”



OSHA Guidance

- Response from employers: “We have encouraged vaccination”
 - Financial incentives, including bonuses, days off, and similar systems
 - Team building: “We are getting through this together and if you get vaccinated, you can take off your masks at work [YAY!]”
 - Some vaccine mandates, particularly in healthcare, but perhaps not widespread across all industries
- CDC guidance on Delta variant caused reconsideration of these systems
- In the wake of the OSHA guidance, many employers required vaccinated employees to re-mask/socially distance
- [Frustrating!]

How Do Employers Verify Vaccination Status?

- Vaccinate their workforce themselves
- Review CDC vaccination cards or similar verification issued by a pharmacy, healthcare provider, or other vaccinator
- If available, review state-issued passes
- Simply ask workers to attest whether they have been fully vaccinated
- If the employer is not able to determine that an employee is fully vaccinated, the employer must treat that employee as not fully vaccinated



OSHA Guidance

- Aside from foreshadowing in terms of the ETS, what does it mean?
 - This is guidance – filled with “should” instead of “shall” language
 - “The recommendations are advisory in nature and informational in content and are intended to assist employers in providing a safe and healthful workplace free from recognized hazards that are causing or likely to cause death or serious physical harm”
 - OSHA’s only enforcement option is the General Duty Clause
 - OSHA must prove that an actual hazard existed at the worksite
 - Not enough to prove that the employer did not follow the guidance
 - OSHA must show an actual COVID-19 hazard (e.g., the employer did not require masking and, as a result, an employee contracted COVID-19)

OSHA's Anticipated ETS

- What will be in the ETS?
 - Based on White House and OSHA press releases, the ETS will require employers to ensure that employees are either vaccinated or undergo testing at least weekly
 - Will apply to employers with 100 or more employees
 - Some of the provisions of the guidance will likely end up in the ETS
- ETS is a floor, not a ceiling
 - Employers can mandate vaccines
 - Employers could provide a different option, such as daily testing

OSHA's Anticipated ETS

- Once an ETS is in place, OSHA no longer has to prove there was an actual hazard
- The employer is in violation if the provisions in the ETS are not followed
- What is an ETS?
 - No notice-and-comment rulemaking
 - ETS is effective immediately upon publication
 - ETS serves as a proposed version of a permanent rule – must be promulgated using normal notice-and-comment procedures within six months when the ETS expires

OSHA's Anticipated ETS

- What does OSHA have to prove?
 - Employees are exposed to “grave danger”
 - Emergency standard is necessary to protect employees
 - Includes protection from a “physically harmful” agent, such as a virus
- What is the timing?
 - Unclear
 - OSHA said to expect the ETS in the “following weeks”
 - Likely effective 14 days from publication
 - Our best guess is that employees electing vaccination would have to have first shot by October 31; weekly testing in the interim

OSHA's Anticipated ETS

- OSHA's past position on vaccinations
 - Bloodborne Pathogens Standard: Employees exposed to blood or similar substances must have a Hepatitis B vaccination OR sign a declination form
 - OSHA provided an alternative to vaccination to address “religious and privacy concerns”
 - OSHA is likely using the same reasoning for the ETS
- Who has to pay for vaccine?
 - Hepatitis B vaccination must be provided at “no cost” to the employee
 - ETS is likely to require the same for COVID-19 vaccination – PTO to get the shot(s) and recover from side effects (time away for side effects likely capped)

OSHA's Anticipated ETS

- Who has to pay for testing?
 - Unclear
 - White House/OSHA are encouraging vaccination over testing – OSHA may allow employers to require employees to pay for testing
 - Some state laws may require the employer to reimburse any testing costs as a business expense

OSHA's Anticipated ETS

- How will the employee threshold be determined?
 - Not clear, though OSHA representative said in a 9/10 webinar ...
 - ... likely to be 100 or more employees total in the United States,
 - BUT what about employees who work alone or from home?
- Why 100 employees? Aren't employees at smaller facilities facing the same hazard?
 - OSHA will likely defend this number by stating that, for an employer of this size, the costs of compliance are justified by the benefits

OSHA's Anticipated ETS

- What happens in states that may prohibit a vaccine/testing mandate?
 - OSHA state plan states – will be required to adopt the ETS or a standard “at least as effective” as the federal ETS
 - Example: South Carolina Governor Henry McMaster said he will fight any mandate from the federal government to the “gates of hell.”
 - South Carolina OSHA could decline not to adopt the ETS, and would argue that some other standard is “at least as effective.”
 - Federal OSHA could refuse to accept South Carolina OSHA’s response and take steps to pull the state’s authority to enforce occupational safety and health standards
 - Time-consuming process

OSHA's Anticipated ETS

- What happens in states that may prohibit a vaccine/testing mandate?
 - Employers in states without a federally-approved state OSHA plan must follow the federal ETS
 - Federal courts will likely hold that state laws that conflict or affect application of the ETS are preempted
 - State law could impact the option an employer chooses
 - Example: In Montana, vaccine status is a protected characteristic, so employers are not permitted to mandate vaccination

OSHA's Anticipated ETS

- Religious/disability accommodations
 - If an employer elects to follow the ETS rather than mandating vaccines, accommodations likely are not required
 - No employee will be forced to get vaccinated – choice between testing at least weekly and vaccination
 - Religious/disability accommodations will be required if an employer decides to mandate vaccines

Ogletree Deakins Resources

- Coronavirus (COVID-19) Resource Center
<https://ogletree.com/coronavirus-covid-19-resource-center/>

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CORONAVIRUS
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Thank you!

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