

A Refocused OSHA: What's the Latest in Rulemaking and Enforcement and What Are We Likely to See (and Not) in 2022?

Presenter

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OSHA in 2022

- The new Secretary of Labor, Solicitor of Labor and Assistant Secretary for OSHA
- COVID-19: Now what?
- What else may be in store in 2022?
- Trends for the near future
- Bonus Content: How best to contest a citation

A faint, light blue world map serves as the background for the slide, showing the outlines of continents and major landmasses.

New Secretary and Solicitor of Labor and Assistant Secretary for OSHA

Secretary of Labor



Martin Walsh
Mayor of Boston

Solicitor of Labor



Seema Nanda

Assistant Secretary of Labor – OSHA




Doug Parker



COVID-19: Now What?

June 10, 2021 – OSHA's First ETS – Healthcare

- Exposure Assessment Plans
 - Infection Control Plans
 - Mandatory No-Exception Protocols
 - Employee Notification
 - Employee Testing
 - Mandatory Training
 - Mini Respiratory Protection Program
 - Recordkeeping
- 

November 4, 2021 – OSHA's Second ETS – Vaccination and Testing

- Covered all employers with 100 or more employees not covered by CMS or verified contractor vaccination rule
- Employees exempted
 - Remote workers
 - Outdoor workers
 - Employees with disabilities or religious objection
- Required
 - Full vaccination or
 - Weekly testing



Where Does that Leave Us?

COVID-19 Healthcare Standard

- Priority for 2022
- OSHA has taken position the June 2021 healthcare COVID-19 ETS was not withdrawn but is simply not being enforced
- OSHA is treating the ETS as a notice of proposed rulemaking/”interim final rule”
 - Comment period reopened January 22, closed April 22
 - Public hearing was to have begun April 27
- Doug Parker: Important to have by the Fall
- Likely to look something like the ETS
- Not likely very controversial

Where Does that Leave Us? COVID-19 Standard for Everyone Else – Nope

- Supreme Court gutted November 2021 ETS as outside OSHA's statutory authority
- So “permanent” standard could not look like ETS
- Prediction: Unlikely to be published in 2022 ... maybe at all
- Confirmed by Doug Parker before House Workforce Protections Committee on May 25 – no COVID-19 standard for non-healthcare ... but ... (later)

Where Does that Leave Us? In the Meantime ...

- August 2021 OSHA Guidance – “Update Coming Soon”
 - CDC guidelines
 - “Best practices”?
- National Emphasis Program
 - Targets high-risk workplaces
 - Healthcare
 - Non-healthcare
 - Relatively limited
- Congressional appropriation
 - Five percent of total inspections annually
 - Primarily lots of “monitoring” inspections

Where Does that Leave Us? In the Meantime ...

- Standards/rules applicable
 - Housekeeping
 - Sanitization
 - Respiratory Protection
 - Hazard Communication
 - Bloodborne Pathogens
 - Recordkeeping
 - Reporting

Where Does that Leave Us? In the Meantime ...

800-Pound Gorilla: The General Duty Clause

SEC. 5. DUTIES

(a) Each employer --

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

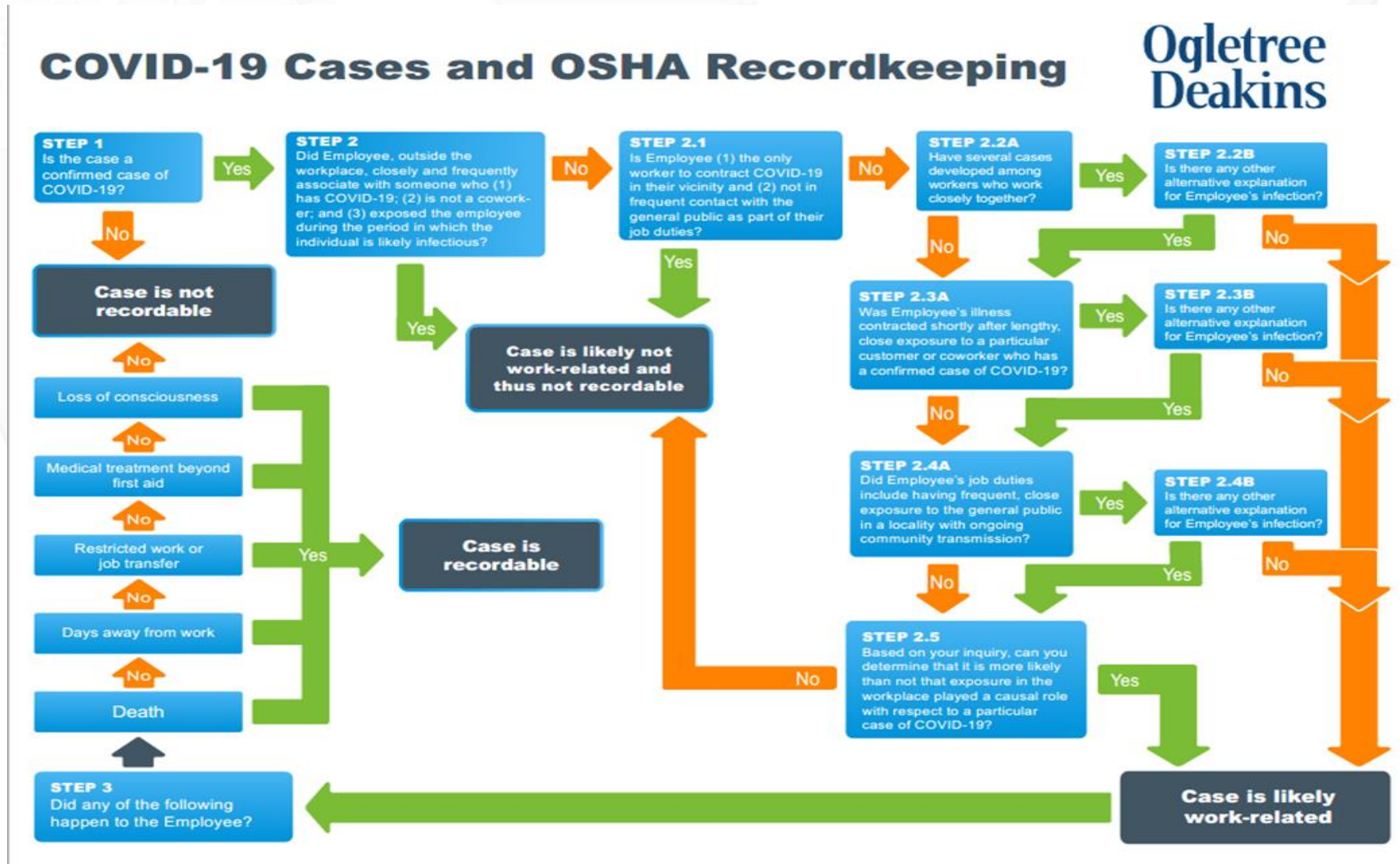
(2) shall comply with occupational safety and health standards promulgated under this Act.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

Where Does that Leave Us? In the Meantime ...

- Examples: heat illness, workplace violence, “requirements” of consensus standards (ANSI, ASTM, NFPA, etc.)
 - A COVID-19 global pandemic?
- Heavy burden of proof on OSHA under General Duty Clause
 - Recognized (occupational, not public health) hazard
 - Actual employee exposure
 - Feasible means of abatement not implemented
- Recognized hazard as of time of inspection/exposure

Where Does that Leave Us? In the Meantime ...

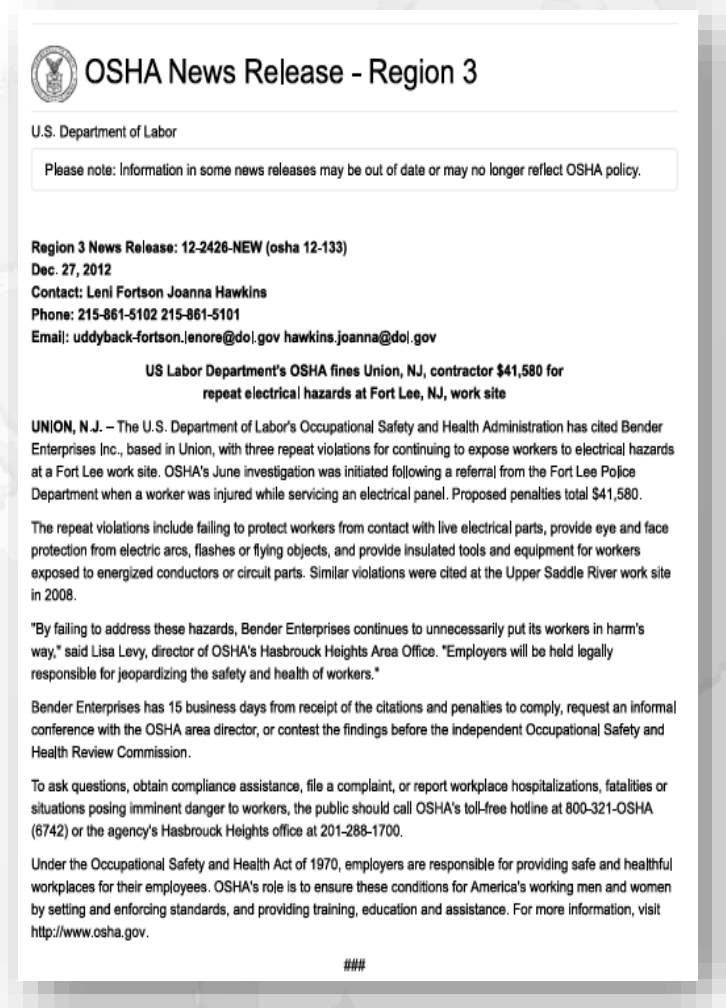




What Else May Be in Store: The Return of Public Shaming?

“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...”



September 24, 2020, DOL Internal Directive

- Only appropriate to issue press release is *after*:
 - Court or other tribunal judgment or decision issued;
 - Conviction or plea agreement reached;
 - Settlement or conciliation agreement regarding remedies or payment of penalty reached; or
 - Time for contesting finding (e.g., citation) elapsed
- Still in force

DEPUTY SECRETARY OF LABOR
WASHINGTON, D.C. 20210

SEP 24 2020

MEMORANDUM FOR: JEANNE KLINEFELTER WILSON
Acting Assistant Secretary
Employee Benefits Security Administration

LOREN SWEATT
Principal Deputy Assistant Secretary
Occupational Safety and Health Administration

DAVID G. ZATEZALO
Assistant Secretary
Mine Safety and Health Administration

CHERYL M. STANTON
Administrator
Wage and Hour Division

CRAIG E. LEEN
Director
Office of Federal Contract Compliance Programs

ANDREW AUERBACH
Acting Director
Office of Labor-Management Standards

FROM: PATRICK PIZZELLA

SUBJECT: Guidance on Enforcement Agency News Releases

As discussed at our recent enforcement agency roundtable with the Secretary, Department of Labor (DOL or Department) enforcement agencies routinely use news releases to inform the public regarding confirmed violations of law and recoveries for American workers achieved through agency investigations. These releases serve important purposes. They bring public awareness to problem areas, inform affected individuals about issues with their employers, and can help deter future violations.

News releases are effective ways of communicating with the American public, but also have the potential to create an online record that is prominent in search results regarding a particular company or labor union. This can be a good thing, but can prove misleading if, for example, the Department issues a release at the time a proceeding is first initiated, and is ultimately found to be unjustified in its enforcement action.

As a matter of Department policy, in general, enforcement agencies should not issue news releases before achieving a successful outcome. Absent extraordinary circumstances, pursuant to which an agency head may seek an exception to the policy

But ...

- A recent example – more measured?
 - “A Waukegan contractor – with a history of violating federal safety standards and ignoring safety citations – was cited again by the U.S. Department of Labor’s Occupational Safety and Health Administration for exposing workers to deadly fall hazards at two separate job sites in October 2021. Joshua Herion – who does business as ECS Roofing Professionals Inc. – faces proposed penalties of \$360,531.”
 - “While ECS Roofing Professionals seem willing to ignore the dangers of falls and the potential for serious injuries or worse, OSHA will hold Joshua Herion and other roofing contractors accountable for failing to meet the legal requirements to provide safe working conditions,” said OSHA’s Area Director Christine Zortman in Milwaukee, who investigated the Waukesha job site. “Fall injuries and fatalities are preventable with the proper use of safety equipment and training.”

A stylized world map in the background, with landmasses in a light tan color and oceans in a light blue color. The map is centered on the Atlantic Ocean.

What Else May Be in Store: Electronic Reporting

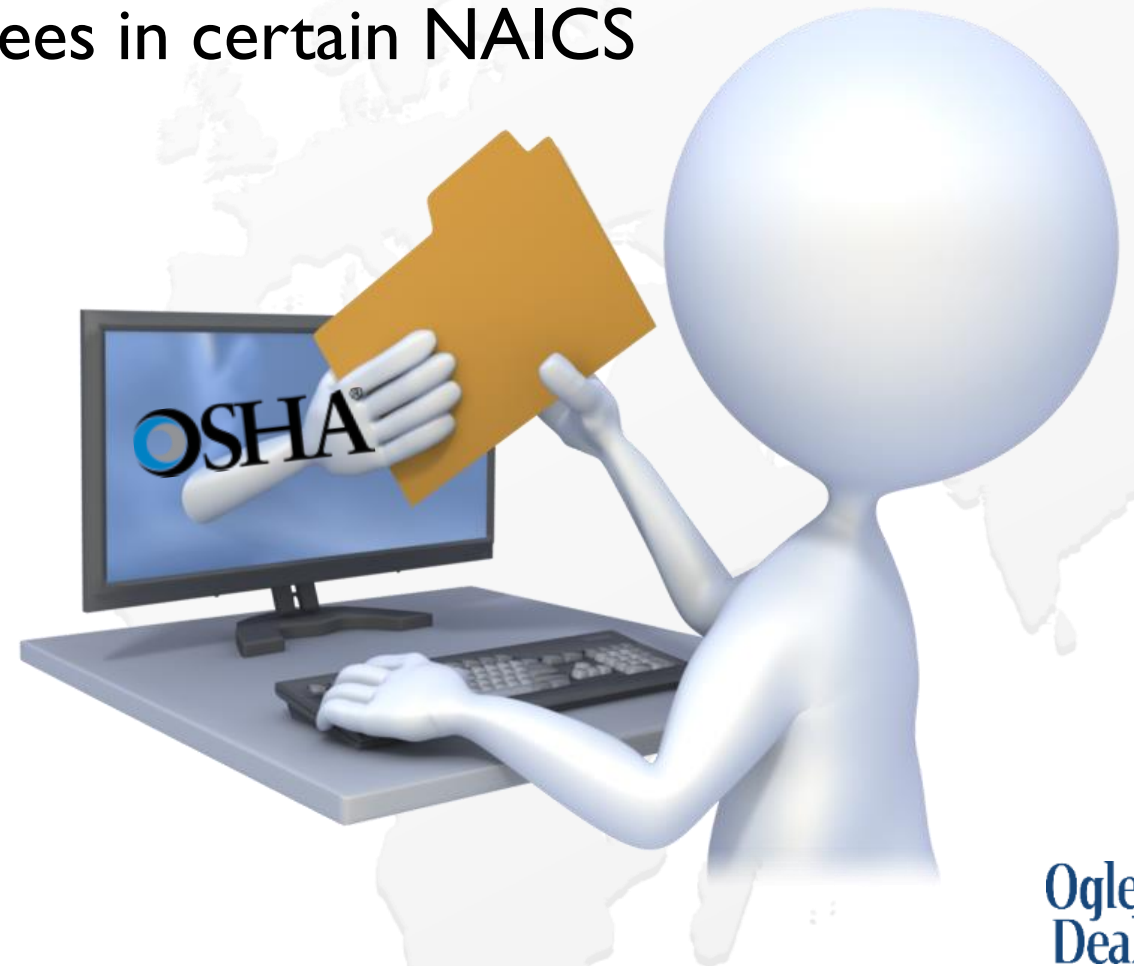
2016 Final Rule

- Establishments with 250+ employees: Submit all 300 logs, 301s forms and 300As
- Establishments with 20-249 employees in certain NAICS codes: Submit 300As only



January 2019 Amendment

- Establishments with 250+ employees: Submit 300As only
- Establishments with 20-249 employees in certain NAICS codes: Submit 300As only



March 2022 Proposed Rule

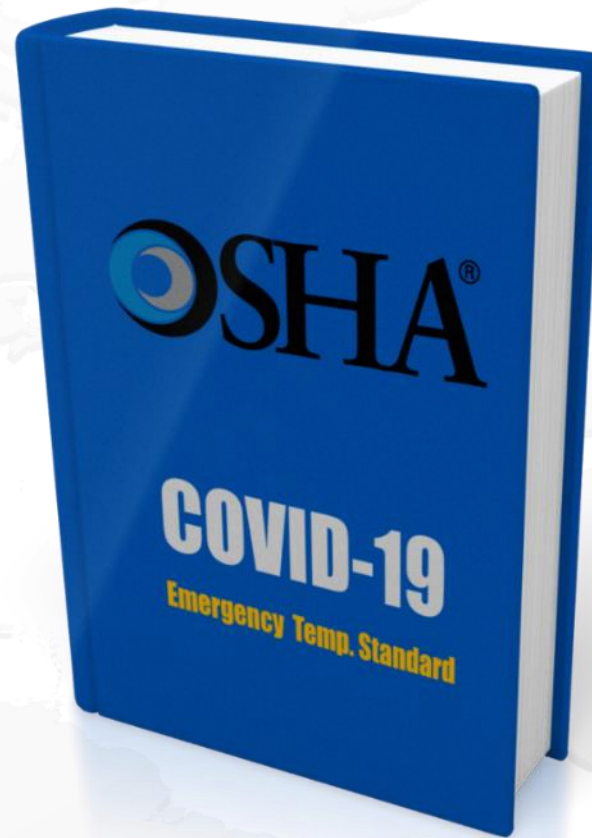
- Published March 30, 2022
- “Improve Tracking of Workplace Injuries and Illnesses”
- Old (2016) is new again (2022) ... kind of
- Establishments with **100+** employees in “high hazard industries” (105): Submit 300 logs, 301s, 300As
- Establishments of 20 to 99 employees in “**highest hazard** industries” (65): Submit 300As only





What May Be in Store: The Return of Rulemaking

Priority I – Healthcare COVID-19



Other Priorities – Infectious Disease



Other Priorities – Infectious Disease

- Generally welcomed by all (most?) constituencies
- No NPRM yet
 - Target year-end (fat chance)
 - Continued work behind scenes
- Designed to cover COVID-19, among other diseases
 - Reason for non-pursuit of non-healthcare COVID-19 standard
 - Other examples: bird flu, swine flu, monkey pox, future pandemics



Other Rulemaking - Heat

- “A regulatory priority”
- No NPRM yet
- National Emphasis Program – April 8
 - Targets specific industries/activities – indoor and outdoor
 - *E.g.*, construction, iron/steel mills, chemical factories, bakeries, skilled nursing
 - When NWS has issued excessive heat warning based on heat index; or
 - Indoor work near radiant heat sources (85+ degrees)
- Extremely difficult to pull off
 - Definition of “excessive heat”
 - Personal characteristics/circumstances
- Doug Parker: Likely no standard for two years



Other (Possible) Priorities

- I2P2
- Lockout/Tagout and Hazard Communication Updates
- Tree Care
- Silica (revise medical surveillance/removal provisions)
- Powered Industrial Trucks (design)
- Lead (blood level for medical removal)
- Walking-Working Surfaces
- Emergency Response





Trends for the Near Future

Trends for Near Future

- Continued loss of agency personnel – aging ➡ resources stretched thin
- OSHA offices slowly reopening to informal conferences
- Decreasing focus by OSHA field on COVID-19
 - But NEP
 - But congressional appropriation => 5%
- On-site inspections back
- Attempt by OSHA to return to “normal”
 - Continued focus on fatalities, amputations, hospitalizations (eye losses)
 - Back to low-hanging fruit
 - Targeting/Emphasis Programs (SST-18, Heat Illness, Amputations, etc.)
 - Schedule (construction)

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Action to Be Taken Now

Recommendations

- Prepare!
 - Familiarize self with OSHA Guidance/CDC guidelines, COVID-19-related and otherwise
 - Understand OSHA's inspection emphases
 - Document
- Don't forget the fundamentals!
 - Back to basics
 - Pay attention to low-hanging fruit
 - Consider FY21 Top 10 most frequently cited violations in manufacturing:

Recommendations

1. Lockout/Tagout (1910.147)
2. Machine Guarding (1910.212)
3. Powered Industrial Trucks (1910.178)
4. Hazard Communication (1910.1200)
5. Process Safety Management (1910.119)
6. Electrical – Wiring Methods, Components, Equipment (1910.305)
7. General Electrical Requirements (1926.305)
8. Mechanical Power Transmission Apparatus (1910.219)
9. Respiratory Protection (1910.134): 1,420
10. General Duty Clause (5(a)(1))



BONUS CONTENT: **How Best to Contest a Citation**

How Best to Contest a Citation

- Analyze citation items carefully for factual accuracy and legal accuracy
- Engage competent legal counsel known to OSHA at outset
- Always request an informal conference, even if no prayer of resolution
 - Relationships – key
 - Time to brag
 - Then more likely to be able to settle on favorable terms
- Remember that informal is not last chance to settle
- Engage Solicitor's attorney early on to discuss settlement
 - Often more likely to lead to resolution
 - Saves time and money
 - Judge will require attempts at settlement

How Best to Contest a Citation

- Understand that the litigation process can be long and expensive
- Proposed penalty is rarely what drives contest/litigation
- Process
 - Informal – AD
 - Trial – ALJ
 - Appeal – OSHRC
 - Further appeal – Court of Appeals
 - Further appeal – Supreme Court

Thank you!

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