

OSHA Reinvigorated: The Latest at the Agency and in Rulemaking and Enforcement

Presenter

Eric E. Hobbs (Milwaukee)



Ogletree
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OSHA in 2023

- New Secretary of Labor Nominee and Almost New Assistant Secretary for OSHA
- Public Shaming
- Expanded Electronic Reporting
- Return of Rulemaking
- COVID-19 (sorry)
- Emphasis Programs
- Other Developments
- How Best to Contest a Citation

A light blue and tan world map serves as the background for the slide. The text is centered over the map.

New Secretary of Labor (Nominee) ... One More Time!

Secretary of Labor (Nominee)



Julie Su
Deputy Secretary of Labor

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

Assistant Secretary for OSHA Getting His Sea Legs

Assistant Secretary of Labor – OSHA



Doug Parker



OSHA on a Role: The Return of Public Shaming

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

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

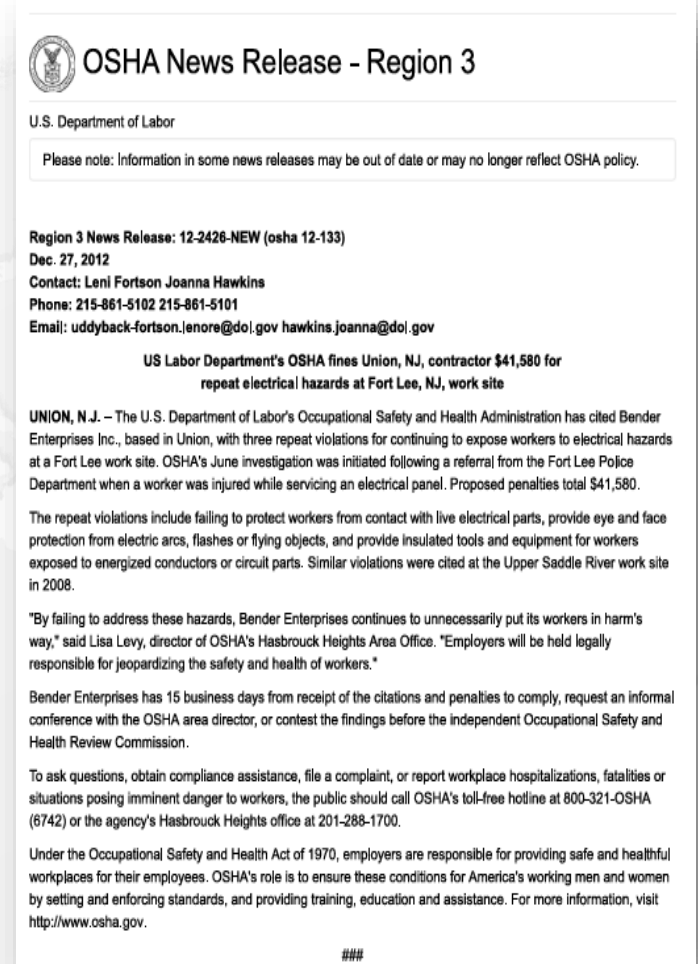
As discussed at our recent enforcement agency roundtable with the Secretary, Department of Labor (DOL or Department) enforcement agencies routinely use news releases to inform the public regarding confirmed violations of law and recoveries for American workers achieved through agency investigations. 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

So What the Heck ...?

- OSHA is ramping it up
- “...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...”



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.jenore@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>.

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So What the Heck ...?

- “[The employer] failed to meet its legal responsibility and it cost a worker their life,” explained OSHA Area Director Mark Briggs in Houston.”
- “The company could have prevented this tragedy by following well-known safety measures meant to protect workers from this very hazard.”

A light blue and white world map serves as the background for the slide. The continents are outlined in white against a light blue ocean. The text is centered over the map.

What's in Store: Expanded Electronic Reporting

2016 Final Rule

- 250+: Submit all 300, 301, and 300A logs
- 20-249 in certain NAICS codes: Submit 300A only



January 2019 Amendment

- 250+: Submit 300A only
- 20-249 in certain NAICS codes: Submit 300A only



March 2022 Proposed Rule

- “Improve Tracking of Workplace Injuries and Illnesses”
- Old (2016) is new again (2022)
- Published March 30, 2022
- Extended comment period closed June 30, 2022
- Since:



March 2022 Proposed Rule

- Proposed rule requires:
 - Employers of 100+ in “highest hazard industries” (105) to e-file all 300 logs, 301s, 300As annually
 - Employers of 20+ in certain “high hazard industries” (65) to file only 300As annually



Final Rule Content?

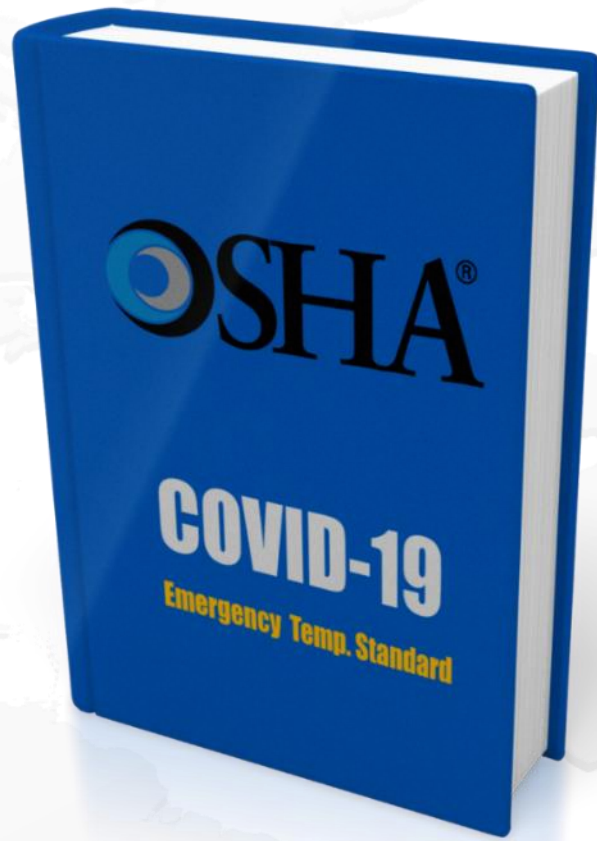
- No way to know exactly
- Probably a lot like, if not same as, proposed rule





The Return of Rulemaking

Priority I



Proposed Rule

- June 2021 ETS treated by OSHA as proposed rule
 - Will apply just to healthcare
 - Extended comment period closed May 23, 2022
 - Final rule sent to OIRA December 6, 2022
- Since then:



Final Rule?

- No way to know exactly
- Probably a lot like, if not same as, ETS
- But hang-up at OIRA
 - Normal “max” review period = 90 days
 - Can be extended
 - But for four more months?

Final Rule?



Next Priority – Heat Illness

- “A regulatory priority”
- No NPRM yet
 - Promised/threatened by end of 2023
- National Emphasis Program – April 8, 2022
 - Targets specific industries/activities
 - *E.g.*, construction, iron/steel mills, chemical factories, bakeries, skilled nursing
 - When NWS has declared heat wave; or
 - Indoor work near radiant heat sources



Next Priority – Heat Illness

- Extremely difficult to pull off
 - Definition of “excessive heat”
 - Personal characteristics/circumstances
 - Feasibility of prevention/abatement
 - Outdoor and indoor
- Model after Cal-OSHA or OR-OSHA standards
 - But outdoor only



Next Up – Infectious Disease



Next Up – Infectious Disease

- On regulatory agenda since 2017
- Request for information, stakeholder meetings, SBREFA panel
- Pandemic shined spotlight, accelerated focus and attention of OSHA
- August of 2022: NPRM to be published by March 2023 (?)
- Since then:



Next Up – Infectious Disease

- Not clear which industries it will cover
- Almost certain to include COVID-19 (other than for healthcare), other potential pandemics, infectious diseases generally (TB, measles, chicken pox, etc.)
- Unclear where in process of development new standard is
- But secondary/tertiary priority

Next Up – Walk-Around Representative

- 2016 OSHA LOI: nonunion employees can select anyone, including outside, nonemployee union agents, to accompany CHSO on walk-around of worksite of non-union employer
- Contradicted existing regulation, 29 C.F.R. § 1903.8, requiring that employee representative be employee of employer
- OSHA sued => settled
- As part of settlement, LOI withdrawn
- Court's conclusion: LOI = rulemaking without going through rulemaking process

Next Up – Walk-Around Representative

- DOL/OSHA regulatory agenda includes rulemaking to adopt same or similar provisions of 2016 LOI
- Timing unclear ... timely before November 2024?

Other “Priorities”

- On OSHA’s regulatory agenda
 - Lockout/Tagout and Hazard Communication Updates
 - Walking-Working Surfaces Update (“clarification”)
 - PPE in construction (fit for females)
 - Silica (revise medical surveillance/removal provisions)
 - Powered Industrial Trucks (design)
 - Lead (blood level for medical removal)
 - Tree Care



COVID-19: Still?

Kind of

- As of today (May 11, 2023), COVID-19 national and public health emergencies expire
- So now what?
- No change for OSHA
 - No COVID-19 for healthcare yet
 - COVID-19 NEP – expired
 - But still may cite employers under OSHA's General Duty Clause
- As a practical matter, no enforcement now except in event of complaint or outbreak
 - Complaints – few to none
 - Outbreaks – few to none

- What should employers do?
 - Keep asking employees to report COVID-19 infections
 - Conduct contact tracing in case of report
 - Recordkeeping and reporting require it



Where Does that Leave Us?

- What should employers do?
 - Continue to allow mask wearing, provide sanitizer
 - Don't focus on it; don't forget about it



Emphasis Programs Abound

Generally

- Why the emphasis on emphasis programs?
 - Allows for inspections OSHA otherwise wouldn't be able to conduct
 - Allows OSHA to address perceived acute hazards
 - Within industries
 - Across industries
 - Focuses resources

Generally

- Three types
 - National emphasis programs (NEPs)
 - Regional emphasis programs (REPs)
 - Local emphasis programs (LEPs)

“New Existing” NEPs of Note – SST

- SST-2020

- Targets “high-rate establishments” based on DART rate – but no threshold rate provided
- Targets “upward trending establishments” having DART rates “at or above twice the private sector” industry average in calendar year (CY) 2019, and trending upward through CY 2021
- Targets “low-rate establishments”, i.e., with low DART rates, to allow OSHA to “verify the reliability” of reported data (not subject to “comprehensive” inspection but only walk-through recordkeeping inspection ... which can easily morph into comprehensive one)

“New Existing” NEPs of Note – Heat

- Heat Illness

- Targets “high-risk” workplaces, e.g., construction sites, automobile factories, petroleum refineries, chemical factories, glass factories, iron and steel mills, bakeries, cattle ranches, farms, skilled nursing facilities
- Unprogrammed inspection if hazardous heat condition is recorded on OSHA 300 log or 301 incident report or if an employee raises a heat-related issue to a compliance officer.
- CSHOs must ask employers about heat-related prevention programs during all inspections

“New Existing” NEPs of Note – Heat

- Focus on workplaces where the heat index is 80°F or higher
- CSHO will assess whether employer:
 - Provides accessible, cool drinking water to employees at all times and at no cost to them;
 - Has written heat illness and injury programs and train employees on hydration, heat illness signs, first aid, and summoning emergency personnel;
 - Monitors ambient temperatures and levels of work exertion at worksites;
 - Schedules rest and hydration breaks;

“New Existing” NEPs of Note – Heat

- CSHO will assess whether employer:
 - Provides access to shaded areas;
 - Provides time for acclimatization of new and returning employees (recommended rule: employees should only work 20 percent of normal duration on first day and gradually increase work duration over one- to two-week period);
 - Schedules job rotations (e.g., earlier start times and employee rotation) to limit heat exposures; and
 - Implements a “buddy” system on hot days.

“New Existing” NEPs of Note – Heat

- CSHO will assess whether employer (cont’d):
 - Provides access to shaded areas;
 - Provides time for acclimatization of new and returning employees (recommended rule: employees should only work 20 percent of normal duration on first day and gradually increase work duration over one- to two-week period);
 - Schedules job rotations (e.g., earlier start times and employee rotation) to limit heat exposures; and
 - Implements a “buddy” system on hot days.

“New Existing” NEPs of Note – Heat

- Citations under General Duty Clause
- So OSHA’s burden heavier
 - Hazard
 - Employer knowledge (knew/should have known)
 - Employee exposure
 - Feasible means of abatement
- Do employers have to do everything NEP provides for?

“New Existing” NEPs of Note – Fall Protection

- May 1, 2023 – NEP on fall-related hazards
- Falls are leading cause of death for all employees
- Applies to following industries:
 - Roof top mechanical work/maintenance
 - Utility line work/maintenance (electrical, cable)
 - Arborist/tree trimming
 - Holiday light installation
 - Road sign maintenance/billboards
 - Power washing buildings (not connected to painting)
 - Gutter cleaning
 - Chimney cleaning
 - Window cleaning
 - Communication towers

“New Existing” NEPs of Note – Fall Protection

- Trigger: whenever CSHO observes employee “working at heights”
 - No definition of/standard for height
- Leaves to local OSHA officials discretion in targeting and inspection
 - Targeting program/criteria must pass legal muster
 - Will present more opportunities for legal challenge



Other Developments

Revised Instance-by-Instance Citation Policy

- Policy since 1990
 - In “egregious willful” cases
 - Citation on violation-by-violation basis
 - Per employee, per machine, per facility, etc., where single abatement feasible
- As of January 26, 2023
 - In any, not just egregious willful, cases
 - Grouping not to be considered as often as in past

Number of CSHOs Way Up

- Number of CSHOs in 2021 at lowest level since beginning of agency
- Part of Administration's promise nearly to double number to 1500 by 2024
- Increase from 750 at end of FY21 to 892 at end of FY22 – 19%
- Number of whistleblower investigators up 37% during same period – from 83 to 114
- Attempt by OSHA to return to “normal”
 - Continued focus by OSHA on fatalities, amputations, hospitalizations (eye losses)
 - Schedule (construction)

Arizona State OSHA Plan Salvaged

- Twenty-one states and Puerto Rico have own, OSHA-approved “little OSHAs”
- No state plan has ever lost its approval
- April 2022 – OSHA files proposal to withdraw approval of Arizona State OSHA Plan
 - Penalties too low
 - Refusal to adopt COVID-19 ETS for healthcare
 - Failure to adopt NEPs for amputations, trenching, silica
- Arizona’s “DOSH” takes steps to “cure”
- February 2023 – OSHA announces withdrawal of proposal to “un-approve”
- October 2021 – OSHA also threatened to take action to “un-approve” South Carolina’s and Utah’s state OSHA plans when they did not adopt COVID-19 ETS for healthcare

OSHA to Expedite Temporary Visas

- OSHA to assist undocumented immigrant workers in getting temporary visas (“U Visas” and “T Visas”)
- Purposes –
 - To enable victims and witnesses of some OSH-related crimes to remain to help law enforcement and OSHA
 - To promote cooperation of undocumented immigrants with OSHA/law enforcement
- Length of visas effectiveness – four years with possibility for extension
- Families may qualify, too

Thank you!

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