

Presented by:

**Eric E. Hobbs (Milwaukee)**



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# OSHA in 2021/2022

- The new Secretary and Solicitor of Labor
- Who will lead OSHA?
- What may be in store for employers in 2022?
- COVID-19: How did we get here and where are we going?
- What employers should do to prepare for 2022



# New Secretary and Solicitor of Labor

# Secretary of Labor



Martin Walsh  
Mayor of Boston

# Solicitor of Labor



Seema Nanda

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# New Assistant Secretary for Occupational Safety and Health

# Assistant Secretary of Labor – OSHA



Doug Parker



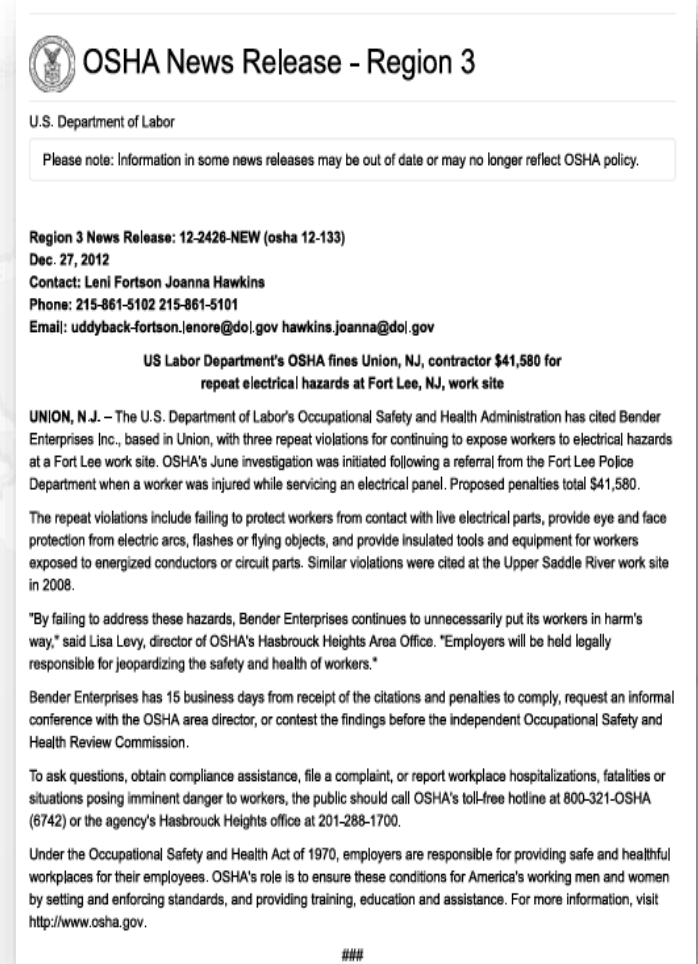


# What's in Store: The Return of Public Shaming?



# “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...”



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Please note: Information in some news releases may be out of date or may no longer reflect OSHA policy.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

###

# 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



# What's in Store: The Battle Over 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



# The Lawsuit

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**



**PUBLICCITIZEN**



# 2021 Regulatory Agenda

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

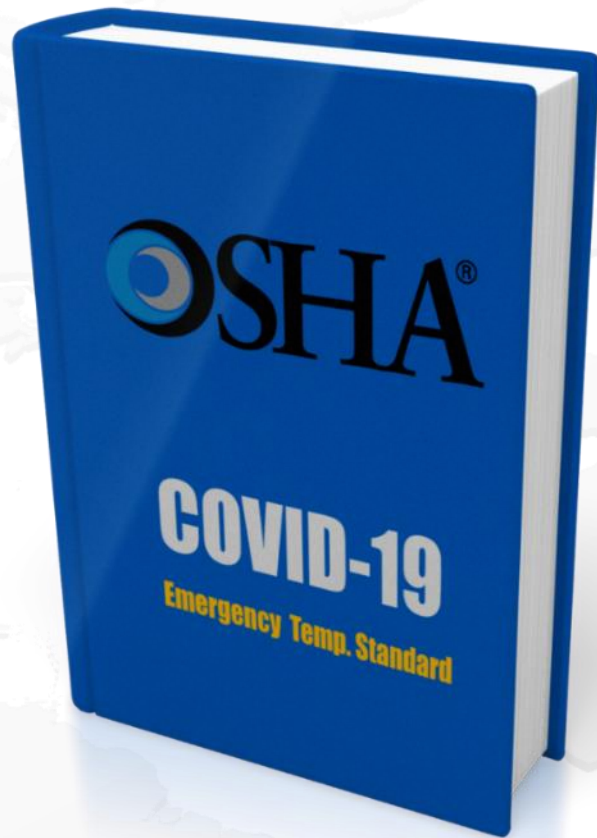




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# What's in Store: The Return of Rulemaking

# 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 Possible Priorities





# 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)





# COVID-19: How Did We Get Here and Where Are We Going?

# January 20, 2021 Executive Order



Executive Order 13991 of January 20, 2021

## Protecting the Federal Workforce and Requiring Mask-Wearing

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 7902(c) of title 5, United States Code, it is hereby ordered as follows:

**Section 1. Policy.** It is the policy of my Administration to halt the spread of coronavirus disease 2019 (COVID-19) by relying on the best available data and science-based public health measures. Such measures include wearing masks when around others, physical distancing, and other related precautions recommended by the Centers for Disease Control and Prevention (CDC). Put simply, masks and other public health measures reduce the spread of the disease, particularly when communities make widespread use of such measures, and thus save lives.

Accordingly, to protect the Federal workforce and individuals interacting with the Federal workforce, and to ensure the continuity of Government services and activities, on-duty or on-site Federal employees, on-site Federal contractors, and other individuals in Federal buildings and on Federal lands should all wear masks, maintain physical distance, and adhere to other public health measures, as provided in CDC guidelines.

**Sec. 2. Immediate Action Regarding Federal Employees, Contractors, Buildings, and Lands.** (a) The heads of executive departments and agencies (agencies) shall immediately take action, as appropriate and consistent with applicable law, to require compliance with CDC guidelines with respect to wearing masks, maintaining physical distance, and other public health measures by: on-duty or on-site Federal employees; on-site Federal contractors; and all persons in Federal buildings or on Federal lands.

(b) The Director of the Office of Management and Budget (OMB), the Director of the Office of Personnel Management (OPM), and the Administrator of General Services, in coordination with the President's Management Council and the Coordinator of the COVID-19 Response and Counselor to the President (COVID-19 Response Coordinator), shall promptly issue guidance to assist heads of agencies with implementation of this section.

(c) Heads of agencies shall promptly consult, as appropriate, with State, local, Tribal, and territorial government officials, Federal employees, Federal employee unions, Federal contractors, and any other interested parties concerning the implementation of this section.

(d) Heads of agencies may make categorical or case-by-case exceptions in implementing subsection (a) of this section to the extent that doing so is necessary or required by law, and consistent with applicable law. If heads of agencies make such exceptions, they shall require appropriate alternative safeguards, such as additional physical distancing measures, additional testing, or reconfiguration of workspace, consistent with applicable law. Heads of agencies shall document all exceptions in writing.

(e) Heads of agencies shall review their existing authorities and, to the extent permitted by law and subject to the availability of appropriations and resources, seek to provide masks to individuals in Federal buildings when needed.

(f) The COVID-19 Response Coordinator shall coordinate the implementation of this section. Heads of the agencies listed in 31 U.S.C. 901(b) shall

# April 26, 2021: ETS Submitted to OIRA (Late)



# May 13, 2021: The Game Changer



## COVID-19

### Interim Public Health Recommendations for Fully Vaccinated People

Updated May 13, 2021 [Print](#)

#### Summary of Recent Changes

Updates as of May 13, 2021

- Update that **fully vaccinated people no longer need to wear a mask or physically distance in any setting**, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance
- Update that fully vaccinated people can refrain from testing following a known exposure unless they are residents or employees of a correctional or detention facility or a homeless shelter



# June 10 – OSHA's First ETS – Healthcare

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 (~11 pages)

# June 10 – 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



# June 10 – OSHA's Updated Guidance – 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

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# August 13 – OSHA's Revised Guidance – All Other Industries

- OSHA revised its COVID-19 guidance on August 13, 2021
  - Prior to the revisions, CDC stated that fully-vaccinated employees need not wear masks or socially distance



# August 13 – OSHA's Revised Guidance – All Other Industries

- OSHA revised its COVID-19 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



# November 4 – OSHA's Second Emergency Temporary Standard – Vaccination and Testing

- November 4 - published
- Covered all employers of 100 or more employees not covered by CMS or government contractor vaccination rule
- Employees exempted
  - Remote workers
  - Outdoor workers
  - Employees with disabilities or religious objection
- Required
  - Full vaccination or
  - Weekly testing

# November 4 – OSHA's Second Emergency Temporary Standard – Vaccination and Testing

- Paid time off for vaccination
- Time for testing
  - Reasonable
  - Payable?
- Paid time off for testing reaction
- Paid time off for COVID-19 infection (work-related or not)
- Masking by all employees not fully vaccinated
  - Indoors
  - In vehicles with others
- Provision of information to employees



# November 4 – OSHA's Second Emergency Temporary Standard – Vaccination and Testing

- Recordkeeping/reporting
  - Roster of vaccinated employees
  - Record of weekly vaccinations
  - Report all work-related fatalities (no 30-day limit)
  - Report all work-related hospitalizations (no 24-hour limitation)
- Provision of information to employees
- January 10 (non-testing) and February 9 (testing) - due dates

# November 4 – OSHA's Second Emergency Temporary Standard – Vaccination and Testing

- First challenge filed in Fifth Circuit
  - November 6 – court of appeal stays enforcement
  - November 12 – court continues stay
- All challenges consolidated, referred to MDL panel
- November 16 – Sixth Circuit chosen to hear/decide cases
  - November 23 - motion for assignment to en banc v. usual, three-judge panel
  - December 16 – court declines to hear case en banc
  - December 17 - panel lifts stay



# November 4 – OSHA's Second Emergency Temporary Standard – Vaccination and Testing

- December 18 – NFIB files application for emergency relief with U.S. Supreme Court
- December 23 – Court orders briefing
- January 7 – arguments
  - Court sets briefing schedule
  - Court schedules arguments for January 7
- January 10 - no decision
- January 13 - decision
  - 6-3 (3-3-3)
  - Six – ETS should be stayed pending review
  - Three – ETS should be stricken
  - Three – OSHA was within its powers to address “grave danger” in workplaces by necessary ETS



# November 4 – OSHA's Second Emergency Temporary Standard – Vaccination and Testing

- January 25 – OSHA announces it is withdrawing ETS on January 26
  - Only for ETS purposes; not for regular rulemaking purposes
  - Motivation?

# Where Does that Leave Us?

- OSHA is treating ETS2 as notice of proposed rulemaking
  - 121,000 comments received as of January 19
  - Reopen record?
- OSHA has said it will publish a new COVID-19 standard in 2022
- What will it look like?
  - NOT exactly like ETS just withdrawn
  - Same but narrower?
  - Targeting “high risk” workplaces?

# Where Does that Leave Us?

- 2021 Guidance
  - CDC guidelines
  - “Best practices”?
  - Non-healthcare
- National Emphasis Program
  - Targets high-risk workplaces
    - Healthcare
    - Non-healthcare
  - Relatively limited
- Hold-overs from canceled healthcare ETS
  - Recordkeeping
  - Mini Respiratory Protection Program

# Where Does that Leave Us?

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

# Where Does that Leave Us?

- 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?

- “Each employer 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”
- Examples: heat stress, workplace violence, work zone safety (internal traffic control plans)
  - A COVID-19 global pandemic?
- What about specific workplaces or types of workplaces?



# Where Does that Leave Us?

- Heavy burden of proof on OSHA under General Duty Clause
  - Recognized hazard
  - Actual employee exposure
  - Feasible means of abatement not implemented
- Recognized hazard as of time of inspection/exposure

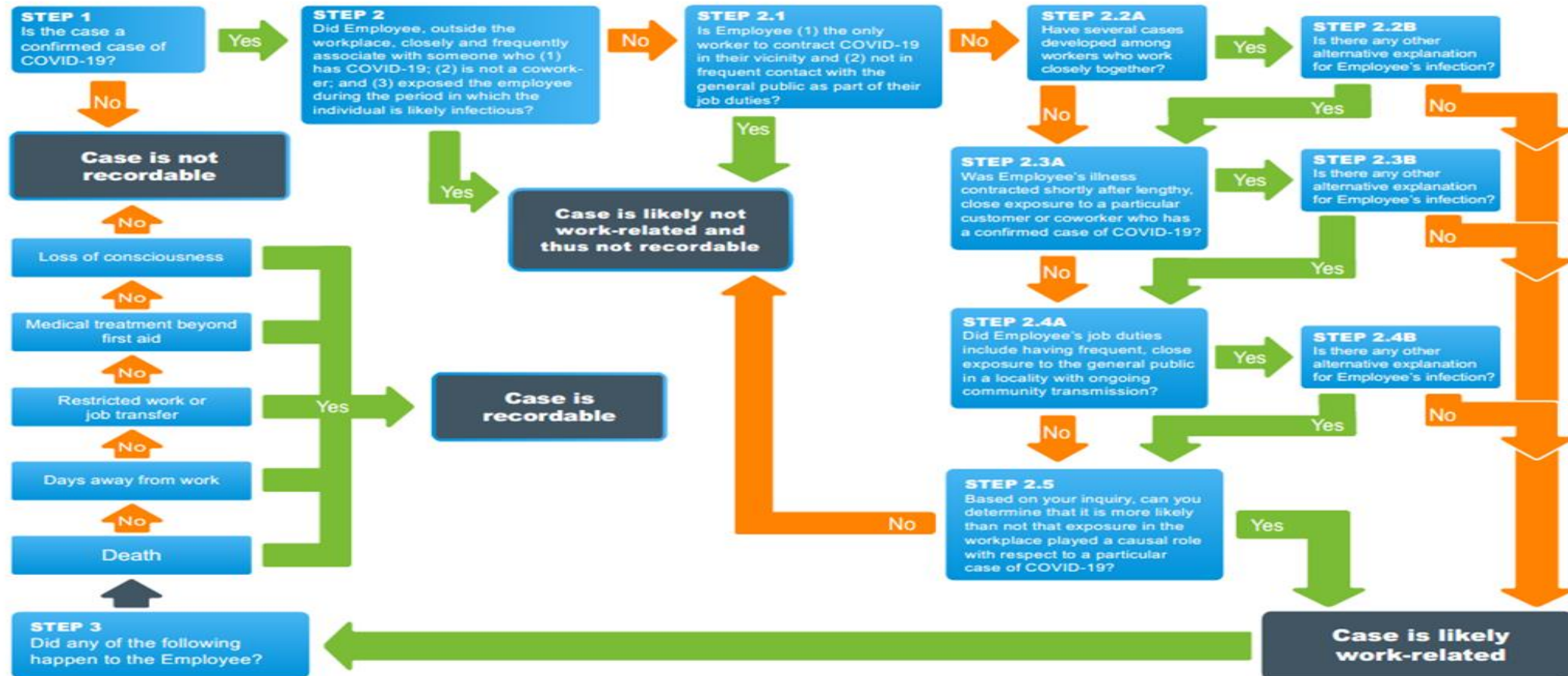
# Where Does that Leave Us?

- Dilemmas
  - Follow through on vaccination/testing programs
  - Reverse vaccination/testing policies
  - No preemption of state/local laws
  - Disability and religious accommodation (still)
  - Determinations of work-relatedness (still)

# Where Does that Leave Us?

## COVID-19 Cases and OSHA Recordkeeping

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# Trends for Near Future

- Continued loss of agency personnel – aging ➡ resources stretched thin
- OSHA offices (most) still closed to conferences
- Decreasing focus by OSHA field on COVID-19
- Increased on-site inspections (varies area to area)
- Attempt by OSHA to return to “normal”
  - Continued focus by OSHA on fatalities, amputations, hospitalizations (eye losses)
  - Targeting/Emphasis Program (SST-18)
  - Schedule (construction)

# Recommendations

- Monitor latest guidance (OSHA and CDC) and review OSH policies/procedures
- Prepare!
  - Familiarize self with OSHA guidances/CDC guidelines
  - Understand OSHA's inspection emphases
  - Document
- Don't forget the fundamentals!
  - Back to basics
  - Pay attention to low-hanging fruit
  - Consider Top 10

# FY21 Top Ten Most Frequently Cited Violations - Manufacturing

1. Fall Protection – General Requirements (1926.501): 5,295
2. Respiratory Protection (1910.134): 2,527
3. Ladders (1926.1053): 2,026
4. Scaffolding (1926.451): 1,948
5. Hazard Communication (1910.1200): 1,947
6. Lockout/Tagout (1910.147): 1,698
7. Fall Protection – Training Requirements (1926.503): 1,666
8. Personal Protective and Lifesaving Equipment – Eye and Face Protection (1926.102): 1,452
9. Powered Industrial Trucks (1910.178): 1,420
10. Machine Guarding (1910.212): 1,113



# Thank you!

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