

# OSHA and Labor Law Update

Conor H. Meeks

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# OSHA Penalty Increases

- 2015 – Congress ordered federal agencies to adjust civil penalties annually, OSHA has done so each January since:

	2015	2016	2017	...	2021	2022	2023
Serious	\$7,000	\$12,471	\$12,675		\$13,653	14,502	\$15,625
Willful/Repeat	\$70,000	\$124,709	\$126,749		\$136,532	\$145,027	\$156,259

- Pres (approx 7.85% increase)

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# **No Specific Federal OSHA Standard for Pandemic Preparedness/Response**

- Relying on the general duty clause, plus other specific standards that address various situations and work practices
- Issued enforcement guidance on several issues, as well as guidance memoranda for employers on control and prevention of COVID-19 spread in the workplace (including industry specific)
- Attempts in 2020 to compel OSHA to engage in emergency rulemaking were unsuccessful
- Some state plans issued temporary standards/rules

# President Biden Issued Executive Order to DOL/OSHA

- January 21, 2021:
  - “issue, within 2 weeks of the date of this order and in conjunction or consultation with the heads of any other appropriate executive departments and agencies (agencies), revised guidance to employers on workplace safety during the COVID-19 pandemic;
  - consider whether any emergency temporary standards on COVID-19, including with respect to masks in the workplace, are necessary, and if such standards are determined to be necessary, issue them by March 15, 2021”

# OSHA Issued Revised Guidance

- January 29, 2021 - Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace
  - Emphasized vaccination is the most effective protection for workers
  - **Encouraged** employers to require employees to be vaccinated or undergo regular testing, in addition to mask wearing and distancing **for those who remain unvaccinated**
    - Until CDC again changed its mind in July in response to “breakthrough infections” for vaccinated people and reverted back to recommending masks for vaccinated individuals when indoors in public areas of substantial or high transmission
  - Encouraged employers to facilitate employees getting vaccinated
- Not a legally enforceable standard or regulation

# OSHA Issued Healthcare ETS

- Announced June 10, 2021
- Scope - settings where employees provide healthcare and healthcare support services, such as hospitals, nursing homes, assisted living facilities, emergency responders, home healthcare workers, and ambulatory care facilities where suspected or confirmed COVID-19 patients are treated
- Requirements:
  - Establish written COVID-19 health plan
  - Implement safety measures
  - Report fatalities
  - Establish mini respiratory protection program

# Healthcare ETS

- Requirements:
  - Paid leave for employees who elect to be vaccinated
  - Provide medical removal protection benefits to workers who must isolate or quarantine
  - Maintain a COVID-19 log all employees who test positive regardless of whether connected to work-related exposure
- Officially published in Federal Register June 21, 2021
- Most provisions took effect July 6
- Expires after 6 months – December 21, 2021

# Challenges to Healthcare ETS

- Not challenged as an invalid exercise of OSHA's emergency rulemaking authority
- UFCW and AFL-CIO filed joint petition for review in DC Circuit claiming the ETS was too narrow, asserting that it “fails to protect employees outside the healthcare industry who face a similar grave danger from occupational exposure to COVID-19.”
  - Pointed to unpublished draft of Healthcare ETS, which revealed that OSHA originally planned for ETS to cover all workers in all industries, which was later narrowed during review by White House's Office of Information and Regulatory Affairs
- Healthcare provider groups asked OSHA for more time to comply



# OSHA Issued Industry-Wide ETS

- Announced September 9, 2021, part of President Biden's "Path out of the Pandemic" Action Plan
- Issued November 4, 2021
- Scope – Employers with 100 or more employees
  - 22 State plans – also covers state/local gov't employers
- Requirements:
  - Mandate all employees to be vaccinated or test negative for COVID-19 at least once per week
  - Determine vaccination status (obtain proof, maintain records for each employee, maintain a roster of each employee's status)
  - Require face coverings for unvaccinated workers
  - Provide paid time for vaccination and recovery

# Industry-Wide ETS

- Requirements:
  - Employees must report positive test results, remove from workplace until they meet criteria to return
    - But no medical removal protection benefits
  - Report work-related fatalities and hospitalizations
- Timeline:
  - State Plans – adopt ETS or issue their own within 30 days
  - December 5, 2021 – implement mandatory vaccination policy and workplace protections
  - January 4, 2022 – implement weekly testing protocols
- Enforcement – Potential \$13,653 penalty per violation (10x if willful or repeat)

# Challenges to Industry-Wide ETS

- Several lawsuits were filed immediately, including by multiple states' attorneys general, employers, and other stakeholders
- November 6, 2021 – Fifth Circuit issues emergency stay
- November 12, 2021 – Fifth Circuit reaffirmed stay in a scathing 22 page opinion, ordering OSHA to “take no steps to implement or enforce the [ETS] until further court order.”
- November 16, 2021 – Sixth Circuit in Cincinnati selected in lottery as the court to hear the merits of the case and decide whether to permanently enjoin the ETS
- December 17, 2021 – Sixth Circuit dissolved Fifth Circuit's stay.

# **Supreme Court Halted OSHA's Industry-Wide ETS - Vax or Test Mandate**

- January 13, 2022 – Supreme Court enjoined enforcement of OSHA ETS which generally required a vaccination or test mandate for large employers
- January 26, 2022 – OSHA withdrew industry-wide ETS
- OSHA pushed forward with public comments and hearing on Healthcare ETS, but still no permanent standard

# OSHA Enforcement Data During the Pandemic

- As of December 31, 2022, OSHA reports it has issued hundreds of citations in COVID-19-related inspections, resulting in \$7.9M in proposed penalties
  - Maintaining a publicly-available list of employers cited to date
- Employers are appealing COVID-related citations to OSHRC at a much higher rate

# Potential NPRM for Infectious Disease Standard

- OSHA considering long-standing infectious disease hazards like tuberculosis and measles as well as new and emerging infectious diseases such as COVID-19 and pandemic influenza
- Control measures might be necessary in healthcare, emergency response, and “other occupational settings where employees can be at increased risk of exposure to potentially infectious people,” and others such as laboratories, coroners’ offices, medical examiners’ offices, and mortuaries.
- Targeting May 2023 issuance of NPRM

# Enhanced Enforcement Activity for Trenching/Excavation

- July 14, 2022 – OSHA issued press release announcing “OSHA enforcement staff will consider every available tool at the agency's disposal” to enforce trenching and excavation safety requirements
- 22 trenching/excavation-related fatalities in first 6 months of 2022 (up from 15 in 2021)
- OSHA compliance officers to perform more than 1,000 trench inspections nationwide where they may stop by, and inspect, any excavation site during their daily duties

# NEP on Heat Illness and ANPRM

- BLS - effects of hazardous heat exposure resulted in average of 35 fatalities per year and 2,700 cases with multiple days away from work between 2015 and 2019.
- October 27, 2021 - OSHA published ANPR) for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings
  - Opened public comment, which closed January 26, 2022
- April 8, 2022 – NEP on Outdoor and Indoor Heat-Related Hazards



# Potential LOTO Update

- OSHA has been gathering feedback from industry stakeholders since issuance of 2019 RFI to see if update to the 1989 standard are necessary.
  - LOTO standard currently specifies that control circuit devices cannot be used as energy-isolating devices, but that “the agency recognizes recent technological advances may have improved the safety of control circuit-type devices.”
- Targeting May 2023 issuance of NPRM

# NPRM on Recordkeeping Rule

- March 30, 2022 – OSHA revived proposed rule to require employers with 100+ employee in certain high-hazard industries to submit OSHA 300/301 information annually, and to publish that data publicly
  - Effected employers are those already required to annually submit 300A
  - Remove requirement for employers with 250+ employees to submit 300A if **not** in high-hazard industry

# New HazCom Rule may be Imminent

- February 16, 2021 - OSHA published NPRM to update the HazCom Standard to align with Revision 7 of the UN's Globally Harmonized System of Classification and Labelling of Chemicals (GHS)
  - would impact employers throughout the chemical supply chain, especially manufacturers of affected chemical products
- OSHA targeting publication date for final rule December 2022

# Questions

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