



Workplace and Occupational Safety and Health Update

2023 Chesapeake AIHA/ASSP Educational Seminar



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Topics of Discussion

- I. Personnel Changes in OSHA
- II. New and Noteworthy Standards, Policies, and Procedures to Watch
- III. An Overview of Enforcement Strategies
- IV. Increased Penalties
- V. Other Areas of Focus for OSHA in 2023 that Employers Should Consider

Background

- OSH Act was enacted in 1970 to assure safe and healthy workplaces for America's workers
- Enforcement is through OSHA or one of 28 approved state plans
- Today, workplace fatalities are down more than 65% from pre-OSHA levels
- The current trend is result of several factors
 - Increased employer awareness
 - Workers Compensation
 - OSHA voluntary compliance initiatives
 - OSHA enforcement (penalties)

OSHA - Overview

Typical Agency



OSHA

Occupational Safety and Health Review Commission



State Enforcement

States may enforce own workplace safety and health laws if state establishes a plan that is approved by OSHA;

- State plan need not be the same as OSHA, but must be “at least as effective”
- State plan must cover state/local employees
 - These workers are not covered under the federal law
- Procedures/structure under state plans may vary

Maryland and Virginia have approved State Plans

Personnel Changes in OSHA

New Leadership at OSHA

On October 25, 2021, the U.S. Senate voted to confirm **Douglas Parker** to lead OSHA

- First confirmed leader in almost five years
- Served as Chief of California's Division of Occupational Safety and Health (Cal/OSHA) since 2019
- Previously served in the Obama Administration as Deputy Assistant Secretary for Policy in the Department of Labor's Mine Safety and Health Administration

What New Leadership Means for OSHA's Priorities

- Changes that we've seen and expect from OSHA's leadership
 - More aggressive and robust enforcement
 - Increasing the number of enforcement inspectors
 - Focusing on heat safety
 - Increasing the number of willful citations and criminal penalties
 - Greater enforcement of whistleblower protections and the 2016 anti-retaliation rule
 - Seeking enterprise-wide abatement
- Expanded collaboration with other agencies
 - On February 28, 2023, President Biden announced he was nominating Julie Su to be the next secretary of the U.S. Department of Labor
 - Currently Deputy Secretary of Labor
 - Previously Labor Secretary for the State of California

Recently Hired Staff Members

- OSHA intends to rebuild its ranks and increase the number of investigators enforcing standards and guidelines
 - August 2021 – OSHA had the lowest number of staff members in over 50 years
 - Hired over 400 people in 2022 to fill vacancies
- **Takeaway:** Recently Hired Staff Members Constitute a Significant Component of Staff Enforcing OSHA in 2023
 - During the ABA's OSHA Mid-Winter Meeting March 7-10, 2023, Assistant Secretary Parker recognized that 1 in 5 OSHA investigators were hired in the last year



New and Noteworthy Standards, Policies, and Procedures to Watch

New Walkaround Rule: OSHA Plans to Reinstate the Fairfax Memo

- **New walkaround rule (1218-AD45):** Permit employee representatives to participate in the inspection, who are not necessarily employees of the employer
 - Workers and certified bargaining units would have the right to designate a worker or union representative to accompany an OSHA inspector during a walk around, regardless of whether the representative is an employee of the employer or if the workplace is unionized
- February 2013 Interpretation Letter called **“Fairfax Memo”**
 - Declared that workers without a collective bargaining agreement may “designate a person or community organization to act on their behalf as a walkaround representative”
 - Allowed the compliance officer to permit a non-employee to participate in an inspection if “reasonably necessary to conduct an effective and thorough physical inspection” (i.e., whenever non-employees will make a positive contribution)
 - Rescinded by the Trump administration
- Notice of Proposed Rulemaking expected **May 2023**
 - Will likely be met with legal challenge

New Walkaround Rule: Considerations for Employers

In advance of the new walkaround rule, Employers should:

- ❖ Review their policies surrounding the handling of OSHA inspections
 - Designate a contact person to accompany the OSHA inspector
 - Ensure procedures are in place to protect confidential and proprietary information
 - Determine their stance on third-party representatives
 - Refusal to allow a third-party might be considered a “refusal of entry,” in which case OSHA can seek a warrant
- ❖ Be prepared for advanced efforts to unionize

Indoor and Outdoor Heat Illness Prevention Initiatives

Heat Illness Prevention Campaign

- ❑ [Advanced Notice of Proposed Rulemaking \(1218-AD39\)](#) published on October 27, 2021, regarding a future standard requiring prevention of heat-related illness
- ❑ [Heat National Emphasis Program](#) issued on April 8, 2022, and remains in effect for three years, unless cancelled or superseded
 - Applies to all industries, but targets specific high-hazard industries or activities
 - OSHA will conduct programmed inspections when there is a heat warning or advisory in the area
 - Focus where employees are exposed to outdoor heat at or above 80°F with humidity at or above 40 percent
 - OSHA will conduct unprogrammed inspections if a hazardous heat condition is recorded on OSHA 300 log or 301 incident report
 - During the ABA OSHA Mid-Winter Meeting, Director, Directorate of Enforcement of OSHA Kimberly Stille noted that there have been 1,685 inspections opened as a result of the NEP and 1,252 violations issued, though very few violations actually related to heat

Indoor and Outdoor Heat Enforcement

- At the federal level, there is no specific standard
 - General duty clause violation (Section 5(a)(1) of the OSH Act)
 - Some state plans have passed specific standards (*e.g.*, California, Oregon, Washington, Colorado, and Minnesota)
 - Maryland proposed a rule in October 2022.
- United States Postal Service Cases, 2023 WL 2263313, 2023 WL 2263314 (OSHRC Feb. 17, 2023)
 - Five GDC citations issued against USPS for exposing letter carriers to “excessive heat”
 - Review Commission reinstated one citation originally vacated and remanded for consideration by the ALJ, acknowledging that heat is a recognized hazard and there are clear methods of abatement
- OSHA has issued guidance concerning heat illness prevention, including for employers to use the following compliance methods:
 - Provide accessible, cool drinking water and access to shaded areas at all times
 - Schedule rest and hydration breaks
 - Implement schedule changes to limit exposure (*e.g.*, earlier start times, employee rotation, etc.)
 - Have a written heat illness and injury prevention program
 - Train employees on heat illness signs and proper hydration

Personal Protective Equipment in Construction: **Fit**

- On September 7, 2022, OSHA issued a Notice of Proposed Rulemaking (1218-AD25) to clarify the requirements for the fit of personal protective equipment provided to construction workers, including hearing, eye, and face protection
 - **29 CFR 1926.28(a)** – “The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.”
 - **29 CFR 1926.95** – “Protective equipment, including personal protective equipment . . . shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.”
- Fit of PPE is considered an issue facing all workers, but particularly women in the industry
- Even prior to the rulemaking, construction industry employers should consider fit to be a part of the current standards and/or the requirements under the General Duty Clause

Personal Protective Equipment in Construction: Helmets

- Fall protection is a key area of enforcement for OSHA
 - 1 in 10 worker deaths (in all industries) is due to falls
 - Pending National Emphasis Program related to fall hazards
 - Citation for violation of fall protection standard more likely than any other standard
 - CSHOs instructed to stop any time employees working at height (and excavations)
- OSHA has transitioned to the use of helmets with chin straps for its officials
 - Considered to offer better fall protection
 - Not required under the standard but considered best practice
- OSHA last updated its head protection rule in 2012, adopting a 2009 industry consensus standard
 - An updated standard addressing chin straps could be published in 2023, which OSHA will likely adopt

Communication Tower Safety

- OSHA intends to issue a Notice of Proposed Rulemaking in March 2023 (1218-AC90)
 - OSHA expects an increase in construction activity on communication towers over the next few years, which could trigger a spike in fatality and injury rates
 - As a result of a 2015 Request for Information, OSHA has concluded current requirements do not adequately cover all hazards of communication tower construction and maintenance activities

Welding in Construction Confined Spaces

- OSHA is proposing to amend the Welding and Cutting Standard in Construction (1218-AD23)
- Intended to eliminate perceived ambiguity of “confined spaces” that applied to welding activities in construction
 - Although the confined spaces standard states that it encompasses welding activities, the welding standard itself does not expressly identify a definition of "confined space"

Workplace Violence Standard

- No specific standard on workplace violence at the federal level, though there has been an increased focus on workplace violence under the General Duty Clause, particularly in healthcare settings
 - In 2017 – OSHA published an Updated Compliance Directive for CSHOs when conducting inspections and issuing citations related to workplace violence
 - In 2019 – The OSHRC upheld violations of the General Duty Clause for an employer’s failure to adequately address workplace violence standards after an employee was fatally stabbed to death by a patient. *See Integra Health Mgmt, Inc.*, No. 13-1124 (OSHC Mar. 4, 2019)
- OSHA will move toward rulemaking on a workplace violence standard for healthcare and other care economy workers (1218-AD08)
 - This plan was addressed by OSHA officials, including Assistant Secretary Parker during the ABA OSHA Mid-Winter Meeting (Annual cost is estimated to be \$1.2 Billion)
 - OSHA also intends to pass a standard on infectious diseases in these settings
- All employers should develop a policy for reporting and responding to workplace violence
 - Existing Guidance from OSHA: “An employer that has experienced acts of workplace violence, or becomes aware of threats, intimidation, or other indicators showing that the potential for violence in the workplace exists, would be on notice of the risk of workplace violence and should implement a workplace violence prevention program combined with engineering controls, administrative controls, and training.”

Other Planned Updates

- [Lock-Out/Tag-Out \(1218-Ad00\)](#) – OSHA issued a Request for Information in May 2019 to understand the strengths and limitations of computer-based controls and plans to amend current standards to align with the increased usage of this technology and harmonize U.S. standards with those of other countries
- [Powered Industrial Trucks \(1218-AD26\)](#) – OSHA is proposing to include the latest version of ANSI/ITSDF B56.1a-2018 Safety Standard for Low Lift and High Lift Trucks in its powered industrial truck standards
- [Walking Working Surface \(12218-AD28\)](#) - OSHA intends to revise language of the requirements for stair rail systems in its final rule on Walking-Working Surfaces for greater clarity
- [Emergency Response \(1218-AC91\)](#) – OSHA is considering updating standards to address the full range of hazards currently facing for emergency responders as well as updated performance specifications for protective clothing and equipment
- [Cranes and Derricks in Construction \(1218-AC81\)](#) – OSHA is proposing amendments to the final standard for cranes and derricks
- [Tree Care \(1218-AD04\)](#) – OSHA intends to develop a standard for tree care operations

An Overview of Enforcement Strategies

Expansion of Instance-by-Instance Citation Policy

- January 26, 2023, OSHA issued a memo concerning a change in policy related to instance-by-instance citations (originally enacted in 1990)
 - Authorizes OSHA regional administrators to issue new violation types as “instance-by-instance citations”
 - OSHA can issue multiple citations where it would have previously only issued one (*e.g.*, per worker, per machine, etc.)
 - May be applied when the text of the relevant standard allows, and when the instances cannot be abated by a single method
 - Four factors to be considered by OSHA in issuing instance-by-instance:
 - (1) The employer has received a willful, repeat, or failure to abate violation within the past five years where the classification is current
 - (2) The employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye
 - (3) The proposed citations are related to a fatality/catastrophe
 - (4) The proposed recordkeeping citations are related to injury or illnesses that occurred as a result of a serious hazard
 - Current guidance limited to high-gravity serious violations specific to falls, trenching, machine guarding, respiratory protection, permit required confined space, lockout tagout, and other-than-serious violations specific to recordkeeping

Reiteration of Anti-Grouping Policy

- On January 26, 2023, OSHA also issued a memo reiterating the policy that allows staff to de-group violations
- Should be considered where:
 - Two or more serious or other-than-serious violations may overall be classified by the most serious item;
 - Grouping two or more other-than-serious violations considered together create a substantial probability of death or serious physical harm; or
 - Grouping two or more other-than-serious violations results in a high gravity other-than serious violation.
- Along with the Instance-by-Instance memo, signals OSHA's intent to be more aggressive with respect to enforcement

Extension of Severe Violator Enforcement Program

- September 15, 2022 – OSHA published Directive Number CPL 02-00-169 to update its Severe Violator Enforcement Program (“SVEP”)
 - Removes a restriction requiring an employee be exposed to specific high-emphasis hazard or release of hazardous chemical
 - Extends required period of time that an employer is subject to the SVEP to at least three years from the date the employer completes abatement
 - Can reduce if the employer agrees to an Enhanced Settlement Agreement under which it develops a safety and health management system

What the Extended SVEP Means for Employers

- An employer may be placed in SVEP based on the following:
 1. **Fatality/Catastrophe Criterion:** A fatality/catastrophe inspection where OSHA finds at least one willful or repeated violation or issues a failure-to-abate notice based on a serious violation directly related either to an employee death, or to an incident causing three or more employee hospitalizations.
 2. **Non-Fatality/Catastrophe Criterion.** An inspection where OSHA finds at least two willful or repeated violations or issues failure-to-abate notices (or any combination of these violations/notices), based on the presence of high gravity serious violations. **Egregious Criterion.** All egregious enforcement actions shall be considered SVEP cases.
- An employer placed in SVEP is subject to enhanced penalties, a mandatory follow-up inspection within one year, regional or nationwide inspection of related workplaces if a single violation reasonably indicates a broader pattern of noncompliance, and publication of SVEP status in press releases

Streamline Whistleblower Complaint Process

- OSHA enforces the whistleblower provisions of 22 different statutes
- February 17, 2023 – OSHA’s new [Whistleblower Complaint Intake Pilot Program](#) went into effect
 - Changes OSHA’s intake process for whistleblower complaints nationwide to increase efficiency and alleviate backlogs
 - Allows investigators to close cases in three categories:
 1. Complaints that are not covered by any OSHA whistleblower statute
 2. Complaints that are untimely and not subject to equitable tolling
 3. Complaints that allege safety or compliance concerns but not retaliation
- OSHA has also engaged in rulemaking for handling employee retaliation complaints
 - Interim Final rule for complaints under the Criminal Antitrust Anti-Retaliation Act effective Feb. 10, 2023
 - Final rule for complaints under the Taxpayer First Act effective May 13, 2023

Private Right of Action

- OSHA generally has the sole authority to pursue claims under the OSH Act
 - *Doe v. Scalia, No. 21-2057 (3d Cir. 2023)* – Employees in PA meatpacking plant filed suit after OSHA determined there was no imminent danger as a result of their employer’s COVID-19 prevention measures
 - Declined to extend employees’ private right of action - “We conclude, therefore, that the private right embodied in § 662(d) is a narrow one, limited to combating imminent workplace dangers that cannot await the conclusion of OSHA’s enforcement proceedings.”
- Center for Progressive Reform (“CPR”) has advocated for a private right of action
 - Direct litigation path for employees who believe their employers are not in compliance with the OSH Act
 - An expedited agency review that ends with a notice of intent to sue, which provides the complainant 90 days to file suit in state or federal court
- A private right of action would exponentially increase OSHA-related litigation

Penalties

Increased Penalties

- Maximum penalties for serious and other-than-serious violations increased from \$14,502 per violation to \$15,625 per violation
- Maximum penalty for willful or repeated violations increased from \$145,027 per violation to \$156,259 per violation
- Maximum penalty for failure to abate increased from \$14,502 per day to \$15,625 per day
- Maximum penalty for posting requirements increased from \$14,502 to \$15,625

Other Priorities for OSHA in 2023

OSHA's Other Commitments

- OSHA has expressed a commitment to Diversity, Equity, and Inclusion
 - OSHA has announced that DEI is a safety issue
 - Looking to make policy changes aimed at increasing DEI
 - **Example** – OSHA now has the authority to issue visa certifications to workers who have had their wages stolen, safety laws violated, or who have experienced other workplace abuses, regardless of immigration status
- OSHA has also indicated that it plans to increase efforts to address mental health challenges and stress in the workplace
- OSHA has published guidance and training on these areas that employers should consider



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