

What to Expect from OSHA Under the Biden Administration

By Courtney M. Malveaux

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President-Elect Joseph Biden has not named a nominee for Secretary of Labor yet, much less an Assistant Secretary of Labor for Occupational Safety and Health who would lead the Occupational Safety and Health Administration (OSHA). But individuals with a background in organized labor may be forerunners. He has promised to be “the most pro-union president you have ever seen” and that “unions are going to have increased power” in his administration.

Emergency Temporary Standard for COVID-19

Rarely have presidential candidates campaigned on promulgating an OSHA standard, but Biden did just that, making it all but certain he will fulfill a campaign pledge to enact an Emergency Temporary Standard to address COVID-19 in early 2021. Any such standard likely will be enjoined in federal court, especially if it follows the one enacted in California. The California standard requires employer-funded COVID-19 testing during work hours, mandates paid leave, and potentially brings unsuspecting employers into the Respiratory Protection standard. That standard is currently being challenged in the California courts by several industry groups and employers adversely impacted by the rule. Employers on a nationwide may need to prepare Infectious Disease Preparedness and Response Plans and train employees accordingly, with little time to prepare.

Several of the 28 “State Plan” states (Virginia, Oregon, Michigan, and California) that operate their own partial or comprehensive workplace safety and health programs have enacted state-based Emergency Temporary Standards for COVID-19, and others may follow. Expect to see a similar standard promulgated by the Mine Safety and Health Administration (MSHA) as well.

OSHA Safety Incentive Program Guidance

Changes in OSHA guidance may be expected. This may include a more prohibitive view of workplace safety and health incentive programs and post-incident drug testing under [OSHA’s 2016 Improve Tracking of Workplace Injuries and Illness Rule](#). In October 2018, OSHA issued a [standard interpretation memorandum](#) clarifying that safety incentive programs are not prohibited so long as they are not implemented in a manner that discourages reporting. It also explained that most instances of post-incident drug testing are permissible under the anti-retaliation rule. A return to the original intent of the 2016 Rule may signal agency intent to view post-incident drug testing and incentive programs as forms of employer retaliation.

OSHA’s Top 10 Violations

The [10 most frequently cited OSHA standards in fiscal year 2019](#) were:

1. Fall Protection (Construction) (29 CFR 1926.501)
2. Hazard Communication (29 CFR 1910.1200)
3. Scaffolding (29 CFR 1926.451)
4. Lockout/Tagout (29 CFR 1910.147)
5. Respiratory Protection (29 CFR 1910.134)
6. Ladders (Construction) (29 CFR 1926.1053)
7. Powered Industrial Trucks (29 CFR 1910.178)
8. Fall Protection — Training (Construction) (29 CFR 1926.503)
9. Machine Guarding (29 CFR 1910.212)
10. Eye and Face Protection (29 CFR 1926.102)

Since the onset of the COVID-19 pandemic, [OSHA has reported](#) an uptick in its use of its [Respiratory Protection](#) standard, [Recording and Reporting Occupational Injuries and Illnesses](#) standard, [Personal Protective Equipment](#) standard, and the [General Duty Clause](#) (the catch-all for any hazards not identified in existing OSHA standards), all related to COVID-19 inspection. Consequently, those

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categories may move up on the list. But that may prove to be a temporary blip once enforcement officers increasingly return to field inspections as the pandemic declines. Expect to see a post-pandemic return to the 10 standards listed above as the most frequently cited.

Enhanced Electronic Recordkeeping

In addition to the whistleblower protections, [OSHA's 2016 Improve Tracking of Workplace Injuries and Illnesses Rule](#) originally required employers to electronically submit information to OSHA from their OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and OSHA Form 301 (Injury and Illness Incident Report) for establishments with at least 250 employees, unless they are exempted from maintaining these documents. Citing the privacy concerns of individual employees whose data would be included in reports that would be published on the agency's website, in 2018, OSHA modified the rule to require employers to electronically submit only summary data on OSHA Form 300A (Summary of Work-Related Injuries and Illnesses).

Labor organizations may be successful in their push for a return to the original policy, which would make information about specific injuries and illnesses publicly accessible to industry competitors, news media, labor organizations, and the general public.

Regulations

Once the limitation on new standards under the current administration lifts, expect renewed regulatory activity. A renewed push for the Infectious Disease Standard may top OSHA's list, especially given the urgency created by the COVID-19 pandemic. This standard may require health facilities and other high-exposure workplaces to implement infectious disease control programs. Many "State Plan" states and MSHA may follow suit. Additionally, new regulations on a variety of subjects, including workplace violence, heat illness, ergonomics, chemical exposure limits, and Injury and Illness Prevention Programs, may be on the horizon. OSHA typically publishes its Unified Agenda of Federal Regulatory and Deregulatory Actions in the spring and fall; the goals of the Biden administration will be clearer by May 2021.

MSHA has announced a proposed rule incorporating national and international voluntary consensus standards related to electric motor-driven mine equipment and accessories, and the agency is accepting comments.

Enforcement

Biden has promised to double the number of OSHA investigators. While a fraction of that number could be hired due to unfilled positions, the remainder would require additional Congressional funding, which could prove difficult.

More manageable would be a continuation of recently increased OSHA enforcement of its Personal Protective Equipment, Respiratory Protection and Recordkeeping standards, and of the General Duty Clause to protect workers during the pandemic. There also may be a strong push for vigorous enforcement of a new Emergency Temporary Standard for COVID-19 for the duration of the pandemic. The agency may pursue more cases involving criminal and egregious penalties and more multi-employer citations.

While OSHA has not abandoned its practice of publishing news releases about enforcement actions, the current administration reduced such reports significantly. OSHA is expected to return to a more active schedule of publishing releases of issued citations in early 2021.

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