

The Year Ahead: OSHA

January 22, 2021

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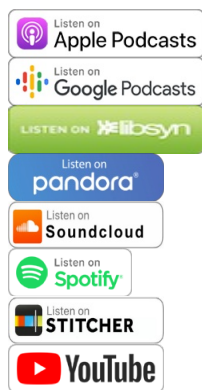
Workplace Safety and Health

Details

January 22, 2021

COVID-19 and the transition into a Biden administration promise to bring big changes to OSHA enforcement and regulatory action both federally and in many states. Join us for a brief, information-packed discussion on what employers should expect in the new year.

Jackson Lewis P.C. · The Year Ahead: OSHA



Takeaways

COVID-19 and the transition into a Biden administration promise to bring big changes to OSHA enforcement and regulatory action under both federal and the laws of many states.

What Employers Need to Know

- COVID-19 introduced a new layer of complexity in an already complex patchwork of regulations governing employers. A variety of agencies are now promulgating rules and standards aimed at protecting the health and safety of employees in addition to OSHA and MSHA:
 - Federal agencies including the CDC, EEOC and HHS.
 - State public health agencies.
 - Governors issuing executive orders.
- Four states already have implemented emergency temporary standards addressing COVID-19.
- OSHA is likely to issue its own emergency temporary standard that would supersede state standards in states governed by federal OSHA.
- Employers can expect to see a revival of the permanent infectious disease standard that will address airborne illnesses like COVID-19. Healthcare and personal care industries will be most immediately impacted.
- OSHA will publish its spring regulatory agenda, most likely in May 2021. Any new rules that come out of OSHA's rulemaking process could be challenged in federal court delaying implementation.
- Under the Biden Administration, employers can expect:

- More press releases and communication as a tactic to deter noncompliance ;
- A push to test novel legal theories and provide the most protection for workers in their work environment;
- An increase in enforcement actions; and
- A backfilling of compliance safety and health officers and possibly adding more, if given a bigger budget by Congress.
- Employers are required to report certain injuries, fatalities and COVID-19 illnesses, hospitalizations and fatalities to OSHA
- Employers have due process rights in OSHA investigations. An experienced attorney can provide invaluable advice and help to ensure the best outcome in an inspection or investigation.

Transcript

Alitia (00:06):

Welcome to Jackson Lewis' podcast, We get work™, focused solely on workplace issues everywhere and under any circumstances. It is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution, and helps answer the question on every employer's mind, how will my business be impacted?

COVID-19 and the transition into a Biden administration promised to bring big changes to OSHA enforcement and regulatory action, both at the federal level and in many states. Join us today for a brief information packed discussion on what employers should expect in the coming year. This episode of We get work™ explores how employers can prepare for OSHA initiatives and workplace safety and health concerns in 2021 and beyond. Our hosts today are Melanie Paul and Courtney Malveaux, principals, respectively, in the Atlanta and Richmond offices of Jackson Lewis.

Melanie, a former trial attorney with the Department of Labor who spent 10 years prosecuting OSHA cases, including work with the Department of Justice to have matters criminally prosecuted, now defends clients against the types of cases prosecuted by her former self. Courtney, no stranger to regulatory action, enforced federal and state OSHA laws as Virginia's labor commissioner before joining Jackson Lewis. Melanie and Courtney, the question on everyone's mind today is how can employers stay on a good side of OSHA by protecting their employees in 2021 and the workplace of the future?

Melanie Paul (01:56):

Well, I think the most important thing that would tell employers is that you need to have an experienced workplace safety and health lawyer in your back pocket to navigate you through this patchwork of compliance that we've had, will continue to have. And more enforcement when 2021 and the new administration bring a COVID standard and potentially other standards that are going to change the workplace.

Courtney Malveaux (02:23):

And I don't envy employers because you have a whole alphabet soup of agencies you

have to deal with. And so we focus a lot on OSHA. And Melanie, I know you and one or two of our folks also focus on MSHA, which deals with mining, but it doesn't stop there. And so other federal agencies that come into play, now especially with vaccines coming online and we're tangling with those questions, the EEOC guidance that's coming out and dealing with vaccines, which impacts the OSHA piece, it really is something to keep an eye on.

And then in addition to that, it's even more complicated because you not only have the federal agencies, but then in the states, a lot of the action's happening in the states. And so OSHA governs generally, but there are 28 states that have what are called state plan states. And they have their own OSHA regime in their own state to some extent. And so they may have their own standards and their own personnel and their own funding, their own policies, et cetera. And so that exists in 28 states and the remainder, OSHA governance.

And then to add more complexity to this are the governors. And they are having executive orders, right and left. Mine, I think is in the 80s in the terms of number of executive orders. And keeping those straight, that can often have a big impact on workplace law and especially OSHA law in your own home state. That's happening, and that's something to keep an eye on. And as if that's not enough, then we have to keep an eye on the localities. And so your city, your county, they often have ordinances. They may have standards that they may enact as well. And we do see that. And so you really have to keep an eye on all these federal, state, local entities.

But I think the fulcrum on which everything rests is the Centers for Disease Control and Prevention, the CDC. Because the CDC guidance generally is what filters out to OSHA, to even oftentimes to the state departments of health. Of course, they're really dovetailing with what CDC is saying. But really you have to keep all that straight. And so having counsel that is on top of all of that is something that is really going to be necessary to stay out of trouble.

Melanie Paul (04:31):

That's right, Courtney. I also think that, as the NIOSH director, John Howard, recently said last month that you have to really stay on top of it. The minute you print out any guidance from CDC, it can become stale just a day or two later as the science continues to change, or our knowledge of the science on the virus continues to change. And as agencies try to shift to account for those changes in what we're learning with the science behind the virus.

So some state plans, California, Virginia, Oregon, and Michigan already have their own emergency temporary standards for COVID. And we expect that federal OSHA is going to be implementing an emergency temporary standard for COVID. We're hoping it's not going to be like California's though. And that's currently got some court challenges going on with that one. But one good outcome from federal OSHA actually issuing an emergency temporary COVID standard would be to perhaps decrease the confusion and the patchwork of compliance with different agencies and different localities. Because federal OSHA in the states where there is no state OSHA, that's going to trump what should compliance be. Employers are going to have to comply with the federal OSHA standard, as opposed to trying to figure out what CDC guidance says, or local health department guidance. The federal OSHA regulation,

should there be one and we do think there will be one, that's going to take precedence over other authorities.

Courtney Malveaux (06:13):

It will, it will. And I will tell you, I think, by all accounts, some emergency temporary standard may have already been written even as going back to as early as this past summer. I think there's a transition team. We now have a labor nominee for secretary of labor. We don't yet have one for assistant secretary in charge of OSHA. But I think as soon as President-Elect Biden lifts his hand from the Bible, I think it's game on. And I think we're going to see very soon what that emergency temporary standard will be coming from federal OSHA. Don't tell my counterparts in Virginia, I'm actually on the safety and health codes board that is right now considering a permanent standard. I'm kind of playing hooky from that meeting just for a little bit for this podcast here, but they are considering that right now.

And so like Melanie said, there's the California standard, which is much more expansive. There's Virginia, which is more restrictive or narrower and more mindful of OSHA's jurisdiction. And there's everything in between. So we don't know which way federal OSHA will go in terms of emergency temporary standard, but all bets are on that that's going to happen. And I think that could be the very first move coming out of the administration. And then there are a number of potential standards that have been floated two administrations ago that may be revived, and there may be additional ones that come up as well. So I think injury and illness protection and prevention, that initiative is something that has not been formalized, but we may see that revived.

And so you ask what are some things that people can do to try to stay out of trouble from OSHA? And one of them is not only being mindful of what the agencies are doing, but also being mindful of what we think they eventually will do. And so under the emergency temporary standard for COVID-19, there are in some states they've carved out that, okay, you must have an infectious disease prevention plan and preparedness plan, and have that in place in case OSHA comes. And so having that prepared, anticipating that you may need to do so if your state doesn't already, that's a good step forward.

Another good step forward, and most employers that are really being mindful of COVID and paying attention to CDC have already done this, and it's the training that was recommended by OSHA. And so we may see some more specifics in terms of exactly what training may need to be done in order to be compliant with this new emergency temporary standard. And again, we have some variations of injury and illness prevention, the I2P2 plans that may be required, especially in California. But who knows? Maybe that's something that will be revised, and that getting ahead of the curve means getting ahead in terms of some of those requirements.

Melanie Paul (09:03):

Yes, Courtney, I agree with that. And also, another remnant from the Obama administration that might be dusted off the shelf is a permanent infectious disease standard. That was worked on, like I said, during the Obama years and was not completed, and then was scrapped during the Trump administration. But now more than ever, the political climate is really such that the agency is going to be looking

towards having a permanent standard to address, not just COVID, but other airborne illnesses.

Currently the bloodborne pathogen standard addresses infectious diseases, but only those that are transmitted through blood or other bodily fluids like saliva. And they don't address airborne illnesses like flu viruses, COVID, Ebola. And so I think what we're going to see is a greater push to prioritize that as a permanent standard. And that's significant because even with the onset of the vaccine now being available, it's going to take a very long time, probably most of 2021, to really get that rolled out.

And the point being is that COVID is not going away just because there's now a vaccine available. In fact, the World Health Organization just today came out and said that they don't believe we are going to reach herd immunity this year. That it may take until 2022 to get there. So what does that mean for employers and compliance with OSHA? That means there is a need for a permanent standard that's going to address infectious diseases that are airborne illnesses like COVID-19. And so even after a large part of the population gets vaccinated, if that does happen, there's still going to be a need to continue social distancing, wearing of facial coverings and other precautions in the workplace. So I think we can expect that that's coming as well, and employers should really get ready for that and work with a safety professional or a workplace safety and health attorney that can really guide them through the process.

That standard is going to mostly affect healthcare, of course, which has been hardest hit by COVID. And also the personal care industry. OSHA has liked to lump those two together. So personal care industry is the assisted living facilities, nursing homes. They've been ravaged by COVID and really were caught off guard and unprepared because many of those companies do not normally provide medical care to their residents. They have apartments, or they live in those long-term facilities, and they don't provide the medical care. So those businesses were caught off guard with COVID and being able to obtain PPE and just really handling COVID, which really, nobody anticipated that we'd be here a year ago.

Courtney Malveaux (12:04):

And I think that's going to be pretty quick work when we see the emergency temporary standard put in place. And then ultimately they'll move forward with a permanent standard. Interestingly, so we're recording this in January, and if that is done fairly efficiently, then we could see movement on some things in some other areas that the work is not done. And especially with the spring coming up, some states have heat variations or heat illness standards. And that's something put on the radar, but also be mindful of that that's something that maybe going forward. Who knows? Will we see a proposed Center of Ergonomics? Will we see revisions to chemical exposure limits?

And so over time, there are so many different standards that have been put on the table. And that work is maybe viewed as not completed by the agency. So we could see activity in those areas as well over the long haul. I don't think just because, if we tackle COVID efficiently, that yes, I think OSHA's still going to have a role in terms of the guidance and maybe revisiting these issues depending on what happens. But I think we're going to see a lot of activity over the stretch over the next four years. I really do.

Melanie Paul (13:27):

Well Courtney, we'll figure out more what that is going to be when OSHA publishes its spring regulatory agenda, which usually happens in the beginning of May. But up until that point, I think it's going to be all COVID. And then the agency will put out its long-term policy agenda for updating current standards or implementing new standards. But I do have to say, though, just because the administration is new and going to take a fresh look at things, regardless of which political party is in the White House or heading the agency, it's still a bureaucracy. And it takes a very long time to get regulations passed, 10 years and more sometimes. And so we do expect changes coming, but how quickly will that really come to fruition? And what will that mean for employers in the long term remains to be seen. How quickly and efficiently is this administration going to be able to act in rulemaking?

Courtney Malveaux (14:32):

And don't forget, it's not just the rulemaking. There are a few lawyers out there who once in a while will enjoin a reg, and that ties things up even for a longer period of time. So that does happen.

Melanie Paul (14:44):

Whatever does come out of this administration, I think we can expect to see challenges in federal court over the provisions of those regulations.

Courtney Malveaux (14:54):

One thing that we saw, and I've never seen it before, was a candidate for president campaigning on OSHA issues. I don't know about you. I have never seen that. And that told me this is serious stuff. I mean, this is really going to happen. Because when a candidate campaigns on issues, you know that they're going to move on it and move quickly.

And so there there's a saying in DC, and maybe you've heard it, personnel is policy. Who is in charge has a whole lot to do with how policy is implemented. And it's really interesting because we keep tabs, not just in terms of the standards, and of course the guidance, but also who's in charge. Because some of it is a question not of the standard, but of touch. And so you may have an administration that, who knows, maybe now will start to get a little bit more into the news releases and doing those more frequently when larger citations are issued.

And I got to tell you, a lot of folks when they receive a citation, seeing them in the press is something that the agency from time to time uses as a way to try to put pressure on employers that they cite. So there's that. And who knows, I would not be surprised to see a little bit more in terms of criminal charges from time to time with more egregious citations. And we do know that the incoming administration is, at least, made a campaign pledge of saying, "Well, we want to double the number of inspectors out there in the field." Now, they can increase some certainly with unfilled positions, but will Congress be on board with providing the funding for additional positions to make that happen? So in terms of enforcement who's in charge and how they approach these standards and how they enforce them, that's going to be another big issue as well to keep an eye on. And I assure you, Melanie and I, and our team are absolutely keeping an eye on all of this.

Melanie Paul (16:48):

Well, and I think that's where actually you see the greatest change between political parties when they changed administrations, and the effect and how that trickles down to OSHA. So I was actually an attorney in the Office of the Solicitor for the Department of Labor during the Obama years, and even before then. And I can tell you that during that time period, there was a very strong push for press releases over just about everything. Because the policy back then was use the tool and the tool belt that's going to scare other straight. Make an example of an employer so that others will fall in line. And I think we're probably going to see a resurgence of that for sure.

The other mantra that we got during those years, in the solicitor's office anyway, was if you are winning all the cases you are trying, you are not trying the right ones. And that means that in a blue administrations, so this new administration is going to share that philosophy to push forward novel legal theories for even existing regulations that we currently have and that OSHA is seeking to enforce. Push the envelope in order to provide the most protection for workers in their work environment. And those are two things I think we can expect to see.

As far as greater enforcement, we're also going to definitely see back-filling of compliance safety and health officers. They're called CSHOs. And during the Trump administration, they've been below their numbers. They just were not able to fill positions after attrition, and they were down several hundred compliance officer positions. So I think that there's going to be a strong push to fill those positions and perhaps add more. But obviously that is contingent upon budget. However, now that the politics have shifted in Congress, I think we're going to see that agencies like the Department of Labor are going to get more money. And they're going to be able to do the things that they really want to do now to effectuate this administration's policies.

Courtney Malveaux (18:58):

More money, more authority. I certainly do think so. And I will tell you, so Melanie, you come from a standpoint of being one of their high power litigators for many years at the agency. And I come from one of the states as a state labor commissioner. And so I got to kind of see it in microcosm, but the entirety of what OSHA does in my home state. And so I will tell you that those closed door conversations and how to deal with citations, as you had, I got to see it. Now we had an opposite point of view in which it was a much more restrained view of what we're going to go after illegally. And so while you may have had administration say, "Push the envelope. Go. Test theories," ours was a very restrained, "Look, you don't bring a case unless you have the goods."

And a lot of the direction, at least for me, was, "Look, we need to make sure we're on all fours if we're going to bring an action. We don't want to end up with egg on our face as an agency." So it really does make a difference. And I will tell you, there are people who would say, "Hey, you need to do more news releases and engage in more public shaming of employers and using that as a weapon." And for some people, and I think you've seen Melanie, that there are studies that show that it may be effective in deterring certain types of conduct. But on the flip side of it is employers that may have their citation put out there by the agency, they say, "Wait a minute, we haven't had our due process yet. We haven't had a chance to even refute or even address the citation with you and tell our side of the story." So there are things like that.

And one of the things that is often overlooked is okay, what's the tone coming from the guidance. Because the standards may say X, but you can kind of send signal in terms of, for example, incentivizing safety. Are you setting a tone of encouraging incentives to employees for safety, or are you discouraging it? And again, that's another debate that you have inside the agency. I'm sure you all had to deal with that. Where on one hand, maybe trying to appeal to the better angels of folks in the workplace who make safety happen and trying to get behind it, either by benefits monetarily or by non-tangible benefits to incentivize, well, that might make sense to your corporate culture.

But then again, there are those who might say, "Well, if you're incentivizing safety, really, you're just incentivizing people to report less in terms of injuries and illnesses." And so that's a big debate. But who's in place and who's in charge and how the guidance comes out, and I think, the tone and tenor of some of that comes out of the agency, is really going to have a big hand in how OSHA is enforced.

Melanie Paul (21:47):

Absolutely, absolutely. So I think that one idea that I want to leave the listeners with is that employers try to do the right thing. They report to OSHA when they're supposed to. Sometimes they over-report. Particularly, that's been the case with COVID. And OSHA shows up, they do an inspection, and the employer wants to cooperate, and that's great. But they don't necessarily understand that they as a company actually do have due process rights. And they, in some instances, are allowed to push back on OSHA. And they don't do it because they think they'll get more out of it if they cooperate.

But I'm here to tell you that OSHA is not showing up at your workplace and going to look at your safety and health programs and pat you on the back, and say, "Good job." Particularly if they're there to investigate an accident or a fatality, even worse. So I cannot caution employers enough, if you have an accident or a fatality, or you've got a COVID illness, hospitalization or fatality, call an experienced attorney who can help walk you through the process and make sure that your rights are protected. Because although OSHA is a very well-meaning agency, they will do what they can get away with by consent. Even if it's really unknowing by the employer that they have the ability to push back.

Courtney Malveaux (23:13):

Right. Well, I'll just wrap up and say amen to that. And you and I, and our team, we do this all the time. And so, like I said, personnel is policy, and knowing who's on the other side has a lot to do with the results you'll get. And so knowing the law, knowing who you're dealing with, knowing what they're thinking, even preferably from somebody who's been in the agency, like some of us have in our group, knowing that in approaching this and then bringing someone in, bringing in help earlier, the better. If you bring me in at late at the game, it's harder to work miracles. But just establishing those relationships and getting knowledgeable assistance, it can really make a big difference.

Melanie Paul (23:52):

100%. Courtney, this has been great. And I really look forward to chatting with you

again.

Courtney Malveaux (23:58):

Absolutely. Let's do this again, and thank you all so much for listening.

Alitia (24:03):

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