

OSHA Update 2022

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A New Sheriff In Town ... Year 2

- Post-Transition all rules frozen that had not yet taken effect
 - Over 40 Exec Orders issued by President Biden, many impacting COVID-19 ETS, workplace safety and employment law, and environmental policy/regs
 - US Dist Ct upheld OSHA decision (Trump-era) to eliminate need for larger employers to submit 300/301 logs electronically - rule reopened (again) by Biden administration
 - Trump Joint Employer rule rejected by US District Court and rescinded by Biden
 - New “single employee” OSHRC decision makes connecting employers easier!
 - Independent contractor rule (reclassifying workers) rescinded by Biden – and reinstated by US District Ct (due to APA error)
- Biden DOL Secretary: Boston Mayor Marty Walsh
- Doug Parker – former CalOSHA chief - confirmed as OSHA Asst Sec. on 10/25/21
- OSHA penalty increases took effect 1/15/2022
 - Maximum for willful/repeat violations: \$145,027 (previously \$136,532)
 - Maximum for serious/OTS and failure to abate: \$14,502 (previously \$13,653)

Outlook: OSHA Priorities

- Priority was on COVID-19 ETS— ETS rules now withdrawn but NEP continues through 7/22
 - 5 state OSHA agencies developed COVID ETS (CA, OR, VA, MI & WA) but most rescinded now
 - More than a dozen others regulated COVID in workplace via health depts (to circumvent federal OSHA) —Amazon lost litigation with NY state over OSHA exclusive jurisdiction.
- Expect:
 - Increased use of criminal penalties (coordinate with DOJ/EPA).
 - Greater use of OSHA “egregious penalty” powers.
 - Heightened whistleblower protection enforcement under Sec 11C and 29 CFR 1904.36.
 - Increase use of employer injury/illness data for enforcement.
 - More multi-employer citations (following OSHA court victory).
 - Renewed scrutiny of incentive programs and post-injury drug testing policies.
 - Continued emphasis on “gig” workers (temps, IC classification).
- Launch additional OSHA National Emphasis Programs.

EEOC, “Long-COVID” & ADA

- September 2021: EEOC declares “Long-COVID” as condition covered by ADA and Section 501 of the Rehabilitation Act if the symptoms substantially limit a “major life activity”
 - Impact on work-related “Long-COVID” cases & worker’s comp – will be state-by-state determination
- EEOC cross-references definition of “long COVID” by DOJ/HHS in their [“Guidance on ‘Long COVID’ as a Disability Under the ADA, Section 504, and Section 1557”](#) - symptoms include:
 - Tiredness or fatigue
 - Difficulty thinking or concentrating (sometimes called “brain fog”)
 - Shortness of breath or difficulty breathing, or cough
 - Headache
 - Dizziness on standing
 - Fast-beating or pounding heart (known as heart palpitations) or chest pain
 - Joint or muscle pain
 - Depression or anxiety
 - Loss of taste or smell
 - Damage to multiple organs including the heart, lungs, kidneys, skin, and brain.

Fall 2021 OSHA Reg Agenda (12/21)

• Prerule Stage:

- PSM Update
- Emergency Response
- Mechanical Power Presses
- Prevention of Workplace Violence (Health care & Social services only)
- Blood Lead Level for Medical Removal (ANPRM overdue)
- Heat Illness Prevention (RFI 10/21 – comment deadline 1/26/22)

• Proposed Rule Stage:

- Improve Tracking of I/I (NPRM at OMB now)
- Infectious Diseases (NPRM 4/22)
- Crane/Derrick Rule Update (NPRM 6/22)
- Hazard Communication Standard Update (in progress – public hearing held 9/21/21)
- LOTO Update (NPRM 9/22)
- Tree Care Standard (SBREFA completed; NPRM 6/22)
- Revisions to crystalline silica rule (reopen Construction Table 1 & medical removal issue) – NPRM 8/22
- Welding in Construction Confined Spaces (NPRM 3/22)
- PIT Design Update (Overdue)

OSHA Top 10 Violations: FY 2021

OSHA Standard	FY 2021 Preliminary Data	Previous Year's Data
1. Fall Protection – General Requirements (1926.501)	5,271 Violations	No. 1 with 5,424 Violations
2. Respiratory Protection (1910.134)	2,521 Violations	No. 3 with 2,649 Violations
3. Ladders (1926.1053)	2,018 Violations	No. 5 with 2,129 Violations
4. Scaffolding (1926.451)	1,943 Violations	No. 4 with 2,538 Violations
5. Hazard Communication (1910.1200)	1,939 Violations	No. 2 with 3,199 Violations
6. Lockout/Tagout (1910.147)	1,670 Violations	No. 6 with 2,065 Violations
7. Fall Protection – Training Requirements (1926.503)	1,660 Violations	No. 8 with 1,621 Violations
8. PPE– Eye and Face Protection (1926.102)	1,451 Violations	No. 9 with 1,369 Violations
9. Powered Industrial Trucks (1910.178)	1,404 Violations	No. 7 with 1,932 Violations
10. Machine Guarding (1910.212)	1,105 Violations	No. 10 with 1,313 Violations

More Changes to OSHA E-Recordkeeping Coming!

- OSHA reopened e-Recordkeeping rule 3/30/22—**60 day comment period**.
 - Does NOT address antiretaliation provisions, only record submission.
- All records submitted electronically will be publicly searchable on OSHA website but will redact personal identifiers of workers (company name WILL be identified as well as worksite name).
- Proposes revising NAICS codes that trigger submission of 300A logs by “small” employers (redefined as 20-99 employees at a worksite).
- Proposes adding new submission requirements for specified employers (using NAICS) with 100+ workers at a worksite—would have to submit 300 and 301 logs PLUS 300A summary log.
 - Current rule requires all employers with 250+ employees to submit 300A, regardless of NAICS, but Trump revisions had eliminated 300/301 log requirements.

Powered Industrial Truck Proposed Rule

- OSHA published a proposed rule 2/16/22 updating the consensus standard reference from the 1969 version of the ANSI/ITSDF B56 voluntary consensus standard to the 2020 iteration of B56.1 and the 2021 version of B56.6
 - Part of overall agency initiative to update hundreds of obsolete consensus standards that are currently IBR
- **Comment deadline is May 17, 2022**
- Issues include whether entire ANSI/ITSDF B56 suite could be incorporated by reference (and free public access)
- Additional standards (OSHA asks whether they should be added to rule):
 - B56.9-2019, covering operator controlled industrial tow tractors,
 - B56.10-2019, addressing manually propelled high lift industrial trucks,
 - B56.11-2018, covering double race or bi-level swivel and rigid industrial casters,
 - B56.11.5-2018, regulating the measure of sound emitted by powered industrial vehicles,
 - B56.11.6-2018, establishing conditions, procedures, equipment and acceptability criteria for evaluating visibility from powered industrial trucks,
 - B56.11.7-2020, establishing dimensions for LPG fuel cylinders used on powered industrial trucks,
 - B56.11.8-2019, providing performance and testing requirements for seat belt anchorage systems in these vehicles, and
 - B56.14-2020, defining safety requirements relating to elements of design, operation and maintenance of industrial and rough terrain vehicle mounted forklifts controlled by a riding operator

Changes to Lead Medical Removal Rule

- March 2022 – OSHA sent preliminary notice to OMB of intent to change blood lead levels (BLL) for medical removal in general industry & construction
 - Could be released for public review within 90 days
- Current (1978) levels are 60 ug/dL (gen ind) and 50 ug/dL (construction), with return at 40 ug/dL – but medical studies find cognitive, renal and reproductive adverse impact below 40 ug/dL
- California’s Medical Management recommends that BLL in adults be reduced to less than 10 ug/dL
- CDC also announced in October 2021 that it was lowering blood lead reference values, used to identify children with high lead exposure, to 3.5 ug/dL.
- EPA is also involved in the multi-agency effort to reduce lead exposures from drinking water and paint.

Heat Stress Prevention ANPRM

- OSHA issued ANPRM on 10/27/21 for a new rule on “Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings” - extended comment deadline was 1/26/22
- OSHA lost key heat stress case where OSHRC held it could not use the National Weather Services’ “Heat Index” for enforcement - *Secretary of Labor v. A.H. Sturgill Roofing, Inc.* This necessitated a rulemaking in order for OSHA to be able to regulate this hazard at the federal level.
- “Excessive heat “ as including outdoor or indoor exposure to heat at levels that exceed the capacities of the body to maintain normal body functions and may cause heat-related injury, illness, or fatality.
- OSHA seeks public comment on the nature and extent of hazardous heat in the workplace and interventions and controls to prevent heat-related injury and illness, including measuring heat exposures, strategies to reduce it, personal protective equipment and other controls, and worker training and engagement
- ANPRM Federal Register notice is: https://www.govinfo.gov/content/pkg/FR-2021-10-27/pdf/2021-23250.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=subscription+mailing+list
 - CalOSHA has a standard to protect outdoor workers from the hazards of working in high heat environments (promulgated in 2006) - applies at all times when employees work outdoors.
 - CalOSHA allows Heat Illness Procedures to be integrated into the IIPP.

OSHA NEP/Guidance on Heat Stress Prevention

OSHA says methods of abating heat stress hazards in workplaces include, but are not limited to:

1. Permitting workers to drink water or cold liquids (e.g., sports drinks) at liberty;
2. Establishing provisions for a work/rest regimen so that exposure time to high temperatures and/or the work rate is decreased;
3. Developing a heat stress program which incorporates the following:
 - a) A training program informing employees about the effects of heat stress, and how to recognize heat-related illness symptoms and prevent heat-induced illnesses;
 - b) A screening program to identify health conditions aggravated by elevated environmental temperatures;
 - c) An acclimation program for new employees or employees returning to work from absences of three or more days;
 - d) Specific procedures to be followed for heat-related emergency situations; and
 - e) Provisions that first aid be administered immediately to employees displaying symptoms of heat-related illness.

OSHA GHS/HazCom Proposed Rule

- OSHA announced proposed rule 2/8/2021 to update its Hazard Communication Standard to align with the 7th revision to the GHS system (in 2/16/2021 Fed. Register)
- Proposed modifications fall into four categories:
 - Maintain alignment with GHS
 - Address issues coming to light since implementation in 2012
 - Alignment with Canada and other US trading partners
 - Improve alignment with other US agencies (DOT, EPA etc.) – but MSHA never adopted GHS at all!
- Has become more contentious than expected – opposed by most business groups
- Comment deadline closed May 19, 2021
- Public hearing was Sept. 21, 2021
 - Docket OSHA-2019-0001 on <https://www.regulations.gov>

Federal OSHA's National Emphasis Programs

- 10 National Emphasis Programs (NEPs) – “Programmed Inspections”
 - NEPs are periodically re-evaluated and refined using inspection data, injury/illness data, NIOSH reports, peer-reviewed literature, analysis of inspection findings and other available information sources
- Current NEPs:
 - Outdoor & Indoor Heat-Related Hazards – CPL 03-00-024 (4/8/22 – in effect for 3 years)
 - Combustible dust – CPL 03-00-008 (3/11/08)
 - Coronavirus (COVID-19) – DIR 2021-03 (revised 7/7/21)
 - Hazardous machinery (LOTO) & Amputation Prevention – CPL 03-00-022 (revised 12/10/19)
 - Hexavalent Chromium - CPL 02-02-076 (2/23/10)
 - Lead – CPL 03-00-009 (8/14/08)
 - Primary Metals - CPL 03-00-018 (10/20/14)
 - Process Safety Management – CPL 03-00-021 (1/17/17)
 - Shipbreaking – CPL 03-00-020 (3/7/16)
 - Crystalline Silica – CPL 03-00-023 (2/3/18)
 - Trenching & Excavation – CPL 02-00-161 (10/1/18)

Protecting America's Workers Act

- HR 2876: Amends the Occupational Safety and Health Act of 1970 to expand coverage under the Act, to increase protections for whistleblowers, to increase penalties for high gravity violations, to adjust penalties for inflation, and to provide rights for victims or their family members (20 cosponsors – introduced 4/28/21)
- Includes variety of improvements to the enforcement provisions of OSHA, such as mandating that employers correct hazardous conditions in a timely manner even if contesting citation
- Authorize felony penalties against employers who knowingly commit OSHA violations that result in death or serious bodily injury and extend such penalties to corporate officers and directors
- Requires OSHA to investigate all fatalities and serious injuries in workplace
- Reinstates employer's ongoing obligation to maintain accurate records of work-related illness and injuries, reversing Trump era Congressional Review Act resolution
- Updates obsolete consensus standards that were adopted when OSHA was first enacted in 1970
- Expands coverage to millions of public sector workers who are currently excluded from the law's protections
- Strengthens whistleblower protections

Other OHS Legislation Under Consideration

- HR 1180 - Accurate Workplace Injury/Illness Records Restoration Act
 - Amend 6-mo SOL so it begins running when OSHA identifies a “continuing violation” instead of on the date the violation occurred
 - Reverses Congressional Review Act “disapproval” of Obama continuing viol. Rule
 - Requires OSHA to issue new rule on recordkeeping requirements as “continuing violation”
- HR 1195 -- Workplace Violence Prevention Act (limited to HC & SS) – **PASSED** House 4/16/21 (254-166 with 38 GOP voting in favor) and referred to Senate
- HR 5664- To require SOL to issue public notice regarding each enforcement action by OSHA resulting in large penalties (\$60K or more), or where multiple violations or repeated OTS violations are present (introduced 10/21/21)
- ✓ **HR 5813, the “NOSHA Act”: Repeals OSH Act of 1970 and abolishes OSHA (sponsored by Rep. Andy Biggs (R-AZ) and 7 co-sponsors)**
- ✓ **H.R.7127—To amend the Occupational Safety and Health Act to prohibit the Secretary from enforcing any drug or vaccine mandate, and for other purposes (sponsored by Rep. Vicki Hartzler (R-MO) and 12 cosponsors)**

Medical Cannabis Update

- 37 states (plus DC and all US territories) have legalized medical cannabis
- 18 states (plus DC, Guam and CNMI) have now legalized recreational MJ – and 13 more (plus USVI) have decriminalized its use
 - AZ, NJ, MT and SD added in 2020 – NM, NY, CT and VA in 2021
 - MD and DE laws likely to change in 2022 – others possible (OH, SD, AR, OK) via referenda

Cannabis & Federal Laws

- Likely that Biden Admin will approve cannabis decriminalization
 - Sens. Booker, Wyden & Schumer issued joint statement 2/1/21 on comprehensive cannabis reform legislation – “Senate will make consideration of these reforms a priority” – expected to address restorative justice, protect public health, implement responsible taxes and regulations
 - SAFE Banking Act passed by House 4/19/2021 to allow commercial banking and credit card activity by licensed cannabis companies (321-101 vote!)
 - Veterans Medical Marijuana Safe Harbor Act ([S. 1183](#) / [HR 2588](#)), is bipartisan legislation to expand and facilitate medical cannabis access to military veterans suffering from chronic pain, PTSD, and other serious medical conditions.
 - Legalization will negate current ADA case law that does not protect medical users because it is “illegal” federally

Medical Cannabis & Worker’s Comp

- The following states hold that employers must reimburse workers who are legal medical cannabis patients :
 - Arizona
 - Connecticut
 - Hawaii
 - Maine
 - Minnesota
 - New Hampshire
 - New Jersey
 - New Mexico
 - New York
 - Rhode Island
 - Vermont
- State laws in flux:
 - Delaware
 - Maryland
 - Pennsylvania
- The following states hold that employers do NOT have to reimburse workers:
 - Florida
 - Massachusetts
 - Michigan
 - North Dakota

NJ & Worker's Comp Cannabis Payment

- NJ Superior Court, Appellate Division, recently held that an employer is required to reimburse its employee for the worker's use of medical marijuana prescribed for chronic pain following a work-related accident.
 - *Hager v. M&K Construction* is the latest in a series affirming this position in New Jersey, in both the private and public sector
 - Court found there was not a tension between the NJ Medical Marijuana Act and the Controlled Substances Act, because the **employer** was not being required to possess, manufacture or distribute the drug but only to reimburse its employee for the purchase of medical marijuana; therefore, the employer faced no threat of prosecution as it had alleged.
 - Injured worker had chronic back pain from work injuries and resulting surgeries, and after 15 years of opiate use, became a medical marijuana patient – court agreed this was beneficial compared with opiate use
- **Similar decisions now in Maine and NH – impact earlier decisions in PA**

Total Worker Health: The Next Frontier?

Issues Relevant to Advancing Worker Well-being Using Total Worker Health® Approaches

Prevention and Control of Hazards and Exposures

- Biological Agents
- Chemicals
- Ergonomic Factors
- Physical Agents
- Psychosocial Factors
- Risk Assessment and Management

Built Environment Supports

- Accessible and Affordable Health Enhancing Options
- Clean and Equipped Breakrooms, Restrooms, and Lactation Facilities
- Healthy Workspace Design and Environment
- Inclusive and Universal Design
- Safe and Secure Facilities

Community Supports

- Access to Safe Green Spaces and Pathways
- Healthy Community Design
- Safe and Clean Environment (Air and Water Quality, Noise Levels, Tobacco-Free)
- Safe, Healthy, and Affordable Housing Options
- Transportation and Commuting Assistance

Compensation and Benefits

- Adequate Wages and Prevention of Wage Theft
- Affordable, Comprehensive, and Confidential Healthcare Services
- Chronic Disease Prevention and Management Programs
- Continual Learning, Training, and (Re-)Skilling Opportunities
- Disability Insurance (Short- and Long-Term)
- Employee Assistance and Substance Use Disorder Programs
- Equitable Pay, Performance Appraisals, and Promotions
- Minimum Guaranteed Hours
- Paid Time Off (Sick, Vacation, Caregiving, Parental)
- Prevention of Healthcare Cost Shifting to Workers
- Retirement Planning and Benefits
- Work-Life Programs
- Workers' Compensation Benefits

Healthy Leadership

- Collaborative and Participatory Environment
- Corporate Social Responsibility
- Responsible Business Decision-Making
- Supportive Managers, Supervisors, and Executives
- Training
- Worker Recognition, Appreciation, and Respect

Organization of Work

- Adequate Breaks
- Comprehensive Resources
- Fatigue, Burnout, Loneliness, and Stress Prevention
- Job Quality and Quantity
- Meaningful and Engaging Work
- Safe Staffing
- Work Intensification Prevention
- Work-Life Fit

Policies

- Elimination of Bullying, Violence, Harassment, and Discrimination
- Equal Employment Opportunity
- Family and Medical Leave
- Human and Natural Resource Sustainability
- Information Privacy
- Judicious Monitoring of Workers and Biomonitoring Practices
- Optimizing Function and Return-to-Work
- Prevention of Stressful Job Monitoring Practices
- Reasonable Accommodations
- Transparent Reporting Practices
- Whistleblower Protection
- Worker Well-Being Centered
- Workplace Supported Recovery Programs

Technology

- Artificial Intelligence
- Robotics
- Sensors

Work Arrangements

- Contracting and Subcontracting
- Free-Lance
- Global and Multinational
- Multi-Employer
- Non-Standard
- Organizational Restructuring, Downsizing, and Mergers
- Precarious and Contingent
- Small- and Medium-Sized Employers
- Temporary
- Unemployment and Underemployment
- Virtual

Workforce Demographics

- Diversity and Inclusivity
- Multigenerational
- Productive Aging across Lifecourse
- Vulnerable Workers
- Workers with Disabilities

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Questions???

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