

Hot Spots in OSHA Enforcement: New Rules and Emphasis Programs

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Presented By

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Abrams has been a professional member of ASSP since 1997 and has been a SPY award recipient at the practice specialty, chapter, and regional level multiple times. She is an active member of the National Safety Council, where she was awarded the Distinguished Service to Safety Award (DSSA) in 2017. Abrams has coauthored several textbooks on employment law, occupational and mine safety and health, and is a regular columnist on safety law issues for multiple magazines.



Biden Administration and OSHA

- Who's in Charge?
 - Doug Parker – former CalOSHA chief has headed OSHA since 10/21
 - House flipped to GOP, narrow margin and first piece of OHS legislation was Rep. Biggs' "NOSHA Act" (abolishes agency)
- Federal OSHA penalty increases took effect 1/15/2023
 - Maximum for willful/repeat violations: \$156,259 (versus \$313K for MSHA!)
 - Maximum for serious/OTS and failure to abate: \$15,625
 - ✓ OSHA is in conflict with some state plan states over refusal to increase penalties

Outlook: OSHA Priorities

- Reboot of VPP program
- IBI enforcement (former “egregious” policy)
- Placement in SVEP – with impact from NLRB “Joint Employer” definition changes
- Increase use of employer injury/illness data for enforcement – new SST program launched in 2023
- More multi-employer citations (following OSHA court victory)
- Continued emphasis on “gig” workers and misclassification of employees as contractors
- Heightened whistleblower protection enforcement under Sec 11C and 29 CFR 1904.36
 - New whistleblower investigations manual issued in 4/2022:
https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-03-011.pdf
- Robust rulemaking agenda!

Agency Collaboration to Protect Workers

Collaboration for protection of workers extends beyond OSHA:

- 11/21: DOL, NLRB, & EEOC launched joint initiative on retaliation issues when workers exercise their protected labor rights
 - Includes collaboration among agencies to protect workers on issues of unlawful retaliatory conduct, worker outreach, educating public; and engaging with employers, business organizations, labor organizations, and civil rights groups
- 1/2022: DOL & NLRB signed new MOU strengthening the agencies' partnership and outlining procedures on information-sharing, joint investigations, and enforcement activity, as well as training, education, and community outreach

IBI Enforcement Policy

- OSHA expanded its “egregious violation” policy to allow its use in high gravity serious violation cases, and recordkeeping cases, rather than limiting it to willful/repeated citations.
- Now called “instance-by-instance” (IBI) cases, the 1/26/23 policy revisions take effect in 60 days, and allow multiple citations and penalties for a single occurrence
- Factors to be considered include:
 - The employer has received a willful, repeat, or failure to abate violation within the past five years where that classification is current
 - The employer has failed to report a fatality, inpatient hospitalization, amputation, or loss of an eye pursuant to the requirements of 29 CFR 1904.39
 - The proposed citations are related to a fatality/catastrophe
 - The proposed recordkeeping citations are related to injury or illness(es) that occurred as a result of a serious hazard.
 - Instance-by-instance citations may be applied when the text of the relevant standard allows (such as, but not limited to, per machine, location, entry, or employee), and when the instances of violation cannot be abated by a single method of abatement.

Severe Violator Enforcement Program

- OSHA relaunched revised SVEP in 10/22, building on original 2010 program
- OSHA's updated SVEP criteria include the following:
 - Program placement for employers with citations for at least two willful or repeated violations or who receive failure-to-abate notices based on the presence of high-gravity serious violations.
 - Follow-up or referral inspections made one year – but not longer than two years –
 - after the final order
 - Potential removal from the Severe Violator Enforcement Program three years after the date of receiving verification that the employer has abated all program-related hazards.
 - Employers' ability to reduce time spent in the program to two years, if they consent to an enhanced settlement agreement that includes use of a safety and health management system with seven basic elements in OSHA's Recommended Practices for Safety and Health Programs (I2P2).

SVEP Criteria

OSHA designates employers as "severe violators" if they have an inspection meeting one or more of the following criteria:

- **Fatality/Catastrophe Criterion:** A fatality/catastrophe inspection in which OSHA finds one or more willful or repeated violations or failure-to-abate notices based on a serious violation related to a death of an employee or three or more hospitalizations.
- **Non-Fatality/Catastrophe Criterion Related to High-Emphasis Hazards:** An inspection in which OSHA finds two or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on **high gravity serious violations** related to a **High-Emphasis Hazard** (e.g., fall hazards and those related to NEPs: amputations, combustible dust, crystalline silica, excavation/trenching, lead, and shipbreaking)
- **Non-Fatality/Catastrophe Criterion for Hazards Due to the Potential Release of a Highly Hazardous Chemical (Process Safety Management):** An inspection in which OSHA finds three or more willful or repeated violations or failure-to-abate notices (or any combination of these violations/notices), based on high gravity serious violations related to hazards defined in the PSM standard.
- **Egregious Criterion:** All IBI enforcement actions will be considered SVEP cases.

Reboot of SST Program

- The inspection plan covers non-construction worksites with 20 or more employees, and uses “objective data” derived from the electronic injury and illness data submitted by employers under 29 CFR Part 1904.41.
- Rebooted SST enforcement plan uses reported data from CY 2019 through 2021 to select the establishments OSHA will inspect, resources permitting – impact of 2023 Final Rule remains to be seen ...
- CPL 02-01-064 took effect 2/23 and will be in effect for two years.
- States that administer their own OSHA programs were directed to have equivalent programs
- If worksite does not meet the criteria due to being < 20 employees, the inspection will be terminated.
- OSHA may conduct a “records only” inspection (including employee interviews) to verify I/I data.
- Any violations in plain view or brought to OSHA’s attention during discussion with workers can expand the scope of the inspection.

VPP Revisions Coming!



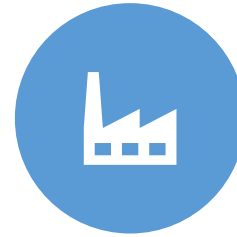
2/16/23 - OSHA PUBLISHED A REQUEST FOR COMMENTS ON WAYS TO “MODERNIZE” ITS DECADES-OLD VOLUNTARY PROTECTION PROGRAM (VPP)



POTENTIAL CHANGES INCLUDE CHARGING A FEE FOR VPP PARTICIPATION, OFFERING NEW INCENTIVES FOR JOINING THE PROGRAM, AND SWITCHING TO A “TIERED” APPROACH FOR WORKSITE RECOGNITION.



VPP WORKSITES HAVE A “DART” RATE THAT AVERAGES 53% BELOW THE AVERAGE FOR THE PARTICIPANT’S INDUSTRY SECTOR (NON-CONSTRUCTION) AND 60% LOWER FOR CONSTRUCTION.



VPP IS AVAILABLE TO DIVERSE INDUSTRIES: EMPLOYERS AND CONTRACTORS,, UNION AND OPEN SHOPS, SITE-BASED AND MOBILE WORKFORCE SITES. THERE ARE APPROXIMATELY 2,200VPP SITES CURRENTLY.



COMMENTS WERE DUE 4/14/23 – DOCKET INFO:
WWW.REGULATIONS.GOV

NEW! OSHA Fall Prevention NEP 5/2023

- Effective 5/1/23, OSHA launched a fall prevention NEP covering both construction & general
- industry
 - Program will be reviewed in 6 mo. to determine effectiveness by analyzing both citations and fall hazard data
 - State plans must notify of intent but adoption is not mandatory
- For non-construction, NEP targets the following activities:
 - Roof top mechanical work/maintenance
 - Utility Line Work/maintenance (Electrical & Cable)
 - Arborist/tree trimming
 - Holiday light installation
 - Road sign maintenance/billboards
 - Power washing buildings (not connected with painting)
 - Gutter cleaning
 - Window cleaning
 - Communication Towers
- For other non-construction work, when worker is observed working at height, inspection MAY be initiated upon approval of area office – if inspection not warranted, CSHO will conduct outreach on Fall Protection

NEW! Warehouse Safety NEP

- CPL 03-00-026 - [National Emphasis Program on Warehousing and Distribution Center Operations](#) - launched 07/13/2023 and is OSHA-wide (state plan notice of intent and adoption is required)
 - Covers inspections at warehousing and distribution center operations, mail/postal processing and distribution centers, parcel delivery/courier services, and certain high injury rate retail establishments
 - NEP will focus on workplace hazards common to those industries, including:
 - powered industrial vehicle operations,
 - material handling/storage,
 - walking-working surfaces,
 - means of egress, and fire protection.
- ***Heat and ergonomic hazards must be considered during all inspections covered by this NEP and a health inspection shall be conducted if OSHA learns that heat and/or ergonomic hazards are present.***



OSHA Heat Illness Prevention NEP 4/22

OSHA NEP looks for employers to incorporate the following into a prevention program, and can enforce via GDC, recordkeeping/reporting, training rules:

- 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.

Other OSHA National Emphasis Programs

- Combustible dust – CPL 03-00-008
- Hazardous machinery (LOTO & Amputations) – CPL 03-00-022
- Hexavalent Chromium - CPL 02-02-076
- Lead – CPL 03-00-009
- Primary Metals - CPL 03-00-018
- Process Safety Management – CPL 03-00-021
- Shipbreaking – CPL 03-00-020
- Crystalline Silica – CPL 03-00-023
- Trenching & Excavation – CPL 02-00-161

Final Changes to OSHA E-Recordkeeping Rule

- OSHA finalized changes to its e-Recordkeeping rule that take effect 1/1/2024
 - 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).
- Revises NAICS codes that trigger submission of 300A logs by “small”
- employers (redefined as 20-99 employees at a worksite).
- Adds new submission requirements for specified employers (using NAICS) with 100+ workers at a worksite—have to submit Form 300 and Form 301 PLUS 300A summary
 - Other employers with 250+ employees continue to submit Form 300A only.

Spring 2023 Reg Agenda

Pre-rule stage – Key Items:

- Mechanical Power Presses. OSHA is analyzing comments from a Request for Information in 2021.
- Workplace Violence in Healthcare and Social Services. Watch for *potential* that the scope of this rule could be expanded, in light of the many mass shootings at retail, service, education and other workplaces -- some unions have called for expansion of state OSHA workplace violence rules. Agency now analyzing comments on SBREFA report.
- Blood Lead Level for Medical Removal. OSHA is reviewing comments from 2022 ANPRM – next action due 12/23. This impacts those doing welding work, as well as those engaged in demolition and waste removal activities, and shooting ranges.
- Heat Illness. SBREFA process concluded and response to draft report is public. Federal rule will impact workplaces in terms of regulating exposure to both indoor and outdoor heat sources.
 - There are already mandated heat exposure reduction standards in a number of states that run their own OSHA programs (e.g., California, Washington, Oregon, Minnesota) and Maryland is developing a rule (early stages)

Spring 2023 Reg Agenda -2

Proposed rule stage – Key items:

- PPE in Construction. NPRM was published in June 2023 (could spill over to Gen Industry). Women workers and some small statured male workers often are not provided with appropriately fitting Personal Protective Equipment (PPE).
 - Powered Industrial Truck Design. The NPRM was published in February 2022, and would update the currently adopted ANSI standard from 1969 and replace it by incorporating more current (2019/2020/2021) ANSI standards for forklifts and other powered industrial trucks. Agency analyzing comments (no due date)
 - Respirable crystalline silica: NPRM due in January 2024 to address medical removal.
 - Walking Working Surfaces amendments. The NPRM for the general industry fall protection rule plans to re-open the rulemaking record May 2023, but this is largely a technical correction.
- *Worker Walkaround Representative Designation. This would “clarify” that the designated representative does not need to be an employee if the representative is so designated by workers, including a union rep or community organizer. This reinstates the “Fairfax” memo from OBAMA OSHA. 9/1/23 NPRM is open for comment for 60 days.*

Spring 2023 Reg Agenda - 3

Final Rule Stage:

- Hazard Communication update, to be issued in 2023. While primarily impacting chemical manufacturers, it will also have an impact on importers and distributors and will likely require retraining of **all** workers to understand the changes in labeling and chemical classification. (NOT at OMB yet)
- Tracking of Workplace Injuries and Illnesses (to require electronic submission of OSHA 300A forms by certain employers of 20 to 99 workers, and expanded submissions by employers of 100 or more to include the OSHA Accident Forms 300 and 301). Final rule released now and takes effect 1/1/24
 - *A lawsuit by unions to force OSHA, to restore the 2016 requirements that were eliminated under the Trump administration, had been on hold but with the recently announced delay, the litigants have threatened to activate the case.*
- *MSHA Powered Haulage rule due 9/2023 – would apply to contractors and delivery drivers at mine sites (program, maintenance & inspection requirements - \$313K max penalty)*
- *MSHA proposed crystalline silica rule was issued and comment period closed 9/11/23. Similar to OSHA rule except credit not given for PPE.*

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” - proposal reopened for additional comment on SBREFA response to draft rule – new deadline is 12/23/2023 (Docket No. OSHA-2021-0009).
 - Proposal covers both outdoor and indoor work settings, and background information can be found on OSHA’s Heat Injury and Illness SBREFA website at <https://lnkd.in/gmj2qBvU>.
- 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

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
- Final rule now overdue!
- Comment deadline closed 5/21 & public hearing was 9/21
 - Docket OSHA-2019-0001 on <https://www.regulations.gov>

Biden Independent Contractor Rule

Rule would restore the multi-factor “totality of the circumstances” analysis from Obama Admin and eliminate emphasis on “entrepreneurial opportunity” (Trump’s rule) – final rule is due 10/2023

- Important b/c OSHA and MSHA adopt DOL definitions and these impact citation policies and defenses – DOL also focused on worker misclassification now!
- DOL proposed independent contractor rule applies a six-factor economic reality test that examines the following areas:
 1. the extent to which the performed work is integral to the employer’s business;
 2. a worker’s level of investment in facilities and equipment;
 3. the nature and degree of control in the working relationship;
 4. a possible contractor’s opportunity for profit or loss;
 5. the amount of foresight and initiative judgment the worker needs to be successful; and
 6. how permanent or temporary the work relationship is.
- ✓ NOTE: the proposed independent contractor rule’s economic reality test looks at the **totality** of the circumstances surrounding a **particular** worker when determining whether they are really an independent contractor.
- ✓ NLRB 6/13/23 decision in **Atlanta Opera** overturned Trump-era Board’s ruling in **SuperShuttle DFW, Inc.** (emphasized entrepreneurial freedom when considering factors to determine a worker’s classification) and restored Obama test for NLRB only

OSHA 2022 Whistleblower Investigations Manual Update

2022: OSHA released “complete overhaul” of WB investigations manual (168 pp)

- <https://www.osha.gov/enforcement/directives/cpl-02-03-011-0>

Agency previously held WB stakeholder meeting post-election, after Trump abolished Whistleblower Advisory Committee

Reflects 11 policy memos issued since end of Obama admin

Gives State OSHA agencies 60 days to adopt own policies on WB protections that satisfy OSH Act requirement to be “at least as effective” as federal OSHA, and 6 months to adopt new protocols

E-Recordkeeping Whistleblower Provisions

- Final rule contains provisions -- 29 CFR 1904.35 (Employee involvement) and 1904.36 (Prohibition against discrimination) – intended to encourage complete and accurate reporting of workplace injuries and illnesses:
 - Employers must inform employees of their right to report work-related injuries and illnesses free from retaliation. This obligation can be satisfied by posting the April 2015 (or later) version of OSHA’s *Job Safety and Health – It’s the Law* poster (www.osha.gov/Publications/poster.html).
 - An employer’s procedure for reporting work-related injuries and illnesses must be “reasonable” and must not deter or discourage employees from reporting.
 - An employer may not discharge or otherwise discriminate against employees for reporting work-related injuries or illnesses
 - This was interpreted under Obama to include drug testing solely due to injury report, disparate discipline and safety incentive programs where worker was denied prize or benefit due to injury

OSHA's Whistleblower Provisions

Statute: Section 11(c)(1) of Occupational Safety & Health Act of 1970:

*“No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.” [**30 DAY STATUTE OF LIMITATIONS**]*

Code: 29 CFR 1904.36 states:

“In addition to protections in 1904.35, the final rule also codifies Section 11(c) into recordkeeping regs, stating:

Section 11(c) of the OSH Act also prohibits you [Employer] from discriminating against an employee for reporting a work-related fatality, injury or illness. That provision of the Act also protects the employee who files a safety and health complaint, asks for access to the part 1904 records, or otherwise exercises any rights afforded by the OSH Act.”

[180-day SOL for issuance of citations]

OSHA Policy on Drug Tests

- Trump OSHA issued “clarifying” policy on 10/11/2018: <https://www.osha.gov/laws-regs/standardinterpretations/2018-10-11>
 - **Biden administration affirmed the 2018 policy in its 2022 whistleblower handbook rev:**
 - Random drug testing.
 - Drug testing unrelated to the reporting of a work-related injury or illness.
 - Drug testing under a state workers’ compensation law.
 - Drug testing under other federal law, such as DOT regs for CDL
 - Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees
 - ***If the employer chooses to use drug testing to investigate the incident, the employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries, and DOCUMENT!***

ESG & SEC Disclosure Rulemaking

- SEC is moving toward issuing new “Climate Change Disclosure” rules requiring corporate disclosure of ESG-related activities – **Proposed Rule (140 pages) was in 4/11/22 Federal Register (87 Fed Reg 21334) – final rule due before end of 2023!**
- SEC proposal requires registrants to provide certain climate-related info in registration statements and annual reports, including greenhouse gas emissions and other metrics
- Proposal also requires info about registrant’s “climate-related risks” reasonably likely to have “material impact on its business, results of operations, or financial condition” disclosure rule with transparency
- Companies would have to conduct 3 levels of analysis on climate impact: (1) direct impact of ops in terms of products made; (2) indirect effects on environment from using electricity, trucks, vehicles; and (3) assess “carbon footprint” of suppliers, business travel & assets that company leases
 - Only “material” disclosures would be required (#3 only applies to largest companies)

ESG : What Must Be Disclosed Now?

- Institutional investors calling for clear regulatory guidance and/or rules for sustainability disclosures (SEC and Financial Accounting Standards Board)
- Issue is “Materiality” – what information is ***MATERIAL to the investment decision*** – substantial likelihood that investor would consider it important in making the investment decision (*TSC Industries v. Northway, SCOTUS 1976*)
 - Can include info about a corporation’s performance on climate change, DEI efforts, political spending, supply chain management (including child labor practices), community support, human capital management and more
 - Currently, ESG disclosure is voluntary (other than PAC contributions, EEOC requirements for federal contractors, SEC reporting of some MSHA citations for publicly traded mining companies)
 - In wake of SOx guidance, most companies formed disclosure committees to cover SEC required info
 - Committee activities can expand to include ESG audits and disclosure, or a subcommittee can be used for this non-reportable info (audit must also consider litigation and reputational risks arising from materially incorrect ESG disclosures)

TWH: 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

Questions?

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