

# OHS & Legal Update 2022: New Rules, Decisions & Legislation

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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 being reopened (again) by Biden administration
  - Trump Joint Employer rule rejected by US District Court and rescinded by Biden
  - Independent contractor rule (reclassifying workers) rescinded by Biden
- 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)

## Occupational Health Focus

- OSHA/MSHA are increasing enforcement & regulatory focus on occupational HEALTH issues
- OSHA air contaminants rules have more specific sampling requirements, and some include medical surveillance and medical removal provisions (e.g., crystalline silica, lead, asbestos, hexavalent chromium, beryllium)
- MSHA enforces air contaminant rules based on single sample (bad IH practice) and inspectors often have minimal IH training (potential for errors)
- MSHA posts noise/dust sampling results on its website, identifying mine site and position sampled – litigation magnet?
- If OSHA e-recordkeeping expands requirements to report 300/301 in public facing manner, would also create potential tort/class action exposure for occupational illnesses
- OSHA and MSHA benchmark most PELs to 1960s TLVs, but some standards have been updated by OSHA; MSHA has changes to crystalline silica and DPM on 12/21 regulatory agenda
- ✓ Prudent employers will be proactive and go beyond minimum compliance to better protect workers!

## 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)

# COVID-19 Guidance

Employers should take steps to protect workers by:

1. Giving paid time off for employees to get vaccinated
2. Instructing workers who've had close contact with infected persons, or who are infected, to stay home
3. Implementing physical distancing for unvaxxed or at-risk workers in all communal work areas
4. Protecting unvaxxed or at-risk workers with face coverings or surgical masks, unless wearing respirator
5. Training workers on C-19 policies in accessible formats and in language they understand
6. Suggesting that unvaxxed customers, visitors and guests wear face coverings
7. Maintaining ventilation systems
8. Performing routine cleaning & disinfection
9. Recording and reporting C-19 infections and deaths\*
10. Implementing protections from retaliation and set up anonymous process to voice concerns
11. Following other applicable OSHA mandatory standards (PPE assessment, respiratory protection, sanitation, BBP, recordkeeping and reporting, medical and exposure records)
  - **General duty clause (Sec 5(a)(1)) can still be used for enforcement!**
  - **State plan state C-19 rules can be more stringent**

## 2021 COVID-19 National Emphasis Program (NEP)

- NEP includes criteria to identify “high hazard industries” targeted for enforcement and compliance actions – in effect immediately (3/12/21) for one year -- can be amended or canceled depending on state of pandemic and info available
  - First GDC citation issued in April 2021 under NEP classified “willful” and assessed at \$136,532 (Liberty Tax)
- C-19 NEP includes a focus on Whistleblower Protections & CSHOs will distribute educational information to workers on their rights under Section 11C & 29 CFR Part 1904
  - NEP uses combination of inspection targeting, outreach to employers, and compliance assistance; if worksite is also under SST, the inspections will be concurrent and wall-to-wall
  - OSHA NEP will include follow up inspections at sites visited in 2020/2021 to monitor efforts

## OSHA PPE Hazard Assessment Requirements

- Under 29 CFR 1910 Subpart I (1910.132) employer must perform a hazard assessment to select appropriate personal protective equipment (PPE) for the hazards that are present, or likely to be present, including foreseeable emergencies.
- Paragraph (d) of 1910.132 is a performance-oriented provision which simply requires employers to use their awareness of workplace hazards to enable them to select the appropriate PPE for the work being performed.
  - Paragraph (d) clearly indicates that the employer is accountable both for the quality of the hazard assessment and for the adequacy for the PPE selected.
- The hazard assessment must be in the form of a written certification as described in 29 CFR 1910.132(d)(2) (does not need to be written for construction but still conduct)
- Employees who are required to use PPE must be trained to know how to select, don/doff, maintain and use the proper PPE that is provided to them ... and be aware of its limitations!

## E.O. 14042: Vax & Federal Contractors

- EO 14042: Ensuring Adequate COVID Safety Protocols for Federal Contractors & OSHA ETS
- Issued 9/9/21 – requires federal executive agencies to include clause in certain federal contracts (and “contract-like instruments”) requiring contractors/subs and some grantees to comply with various C-19 safety measures – **CURRENTLY STAYED BY FED COURT!**
- Deadlines were Oct 15 (solicitations) and Nov 14 (contracts awarded)
- Contractors don’t have to terminate unvaxxed workers if they can find a job for them that does not involve government work or a “covered contractor workplace” (without shared services)
- DFARS 52.223-7999 directs contractor to “flow down” substance of the clause to contracts at any tier that exceeds the Simplified Acquisition Threshold (\$250K currently - defined in FAR 2.101), and all subcontractors will have to comply with the vaccine mandates
- Contractors are receiving modifications to prime contracts already incorporating the E.O. – stating per guidance that “all covered contractor employees must be fully vaccinated no later than December 8, 2021” (means this week is the last to safely get first shot and meet the full vax deadline)
- Attachment A to the DFARS states “Contractor shall include the substance of this clause in subcontracts at any tier that exceed the SAT on the date of the subcontract award, and are for services, including construction, performed in whole or in part within the US or its outlying areas”

## E.O – Federal Contractors

- If you sell a service to the US Govt or to a business that sells to the USG, you **will** be impacted
- Requires vaccinations (with ADA/religious exceptions), proper masking, and physical distancing – spelled out in the Task Force Guidance on the E.O. and following CDC guidelines indoors and out
- Must have *COVID SAFETY COORDINATOR* to monitor contractor compliance efforts (including vax documentation, distancing, masks)
- Requirements apply to: employees working on covered contract; employees supporting covered contract; and employees working in location that a covered employee is “likely to visit” – even covers contractor employees working from home
- Reasonable accommodations for contractors with exceptions – may need to allow telework if feasible, or unpaid leave of absence, but must be interactive process with employee

## 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.

## 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

## 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](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 New 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 7<sup>th</sup> 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:
  - 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)

## OSHA Silica NEP 2020

- In 2020, OSHA launched new NEP for silica (CPL 03-00-0023) across all industries – 2% of ALL OSHA inspections must target RCS
  - [https://www.osha.gov/sites/default/files/enforcement/directives/CPL\\_03-00-023.pdf](https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-023.pdf) - state plan participation is mandatory
  - Area offices conducted 3 months of outreach before NEP enforcement begins
- *General Industry*: NEP contains updated NAICS list –sectors with the largest numbers of workers performing tasks with RCS overexposures
- *Construction*: Will use OSHA Construction Inspection Targeting Application (C-target), CSHOs’ observations of area construction sites (i.e., knowledge gathered by CSHO “drive-bys”), and local knowledge (e.g., lists of projects from the local DOT)
  - See also CPL 02-00-155, Inspection Scheduling for Construction.
  - Appendix A also lists construction operations likely to have RCS exposures, provided as an aid for compliance officers
  - If worksite is also selected for inspection under SST initiative – inspections will be conducted concurrently (expands scope)



## MSHA Crystalline Silica Rulemaking

- MSHA is engaged in rulemaking on silica - current limit is 100 ug/m<sup>3</sup> equivalent (50% higher than OSHA's PEL)
  - RFI comments closed 10/28/19 – **proposed rule due MAY 2022**
  - Legal issues surrounding the strict liability issues
  - MSHA demands for historical sampling data, medical surveillance and more
- Key MSHA issues
  - Whether to adopt a universal PEL of 50 ug/m<sup>3</sup> across OSHA/MSHA (coal and MNM) and whether to include an action level of 25 ug/m<sup>3</sup>
  - Whether to adopt a "Table 1" approach for common high exposure tasks or require individualized periodic sampling
  - Whether to allow the use of respiratory protection or require exposure to be limited solely through engineering/work practice/ administrative controls (Mine Act issues)
  - Whether to issue overexposure citations based solely on operator's own sampling results (current document/data requests underway)
  - Whether to require medical surveillance (what trigger), medical removal for workers with Chest X-rays of 1/0 or worse by an ILO certified B-Reader

## 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 OSHAct, 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 OHS 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)**

## 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 could change in 2022
- Likely that Biden Admin and “blue” Congress will approve cannabis decriminalization as part of social justice initiatives
  - 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

# 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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