

OSHA May Issue COVID-19 Standards Under Biden Administration

By Allen Smith, J.D.

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Employers can expect increased enforcement by the Occupational Safety and Health Administration (OSHA) under the Biden administration and possibly emergency temporary standards to combat COVID-19. The hiring of more OSHA inspectors also is likely.

"The Biden campaign has stated publicly that the development of an emergency temporary standard is a priority for the new administration," said Eric Hobbs, an attorney with Ogletree Deakins in Milwaukee. "What it will look like is much more difficult to say."

Possible Contents of Standard

California, Michigan, Oregon and Virginia have emergency temporary standards, which are different.

"The Virginia standard is quite long and can be somewhat complicated for uninitiated employers to follow," said Alana Genderson, an attorney with Morgan Lewis in Washington, D.C.

"Other states have taken a more streamlined approach—for example, Michigan," she said. "Virginia has relied heavily on after-the-fact FAQs to guide employers. Hopefully, any federal standard will learn from the Virginia FAQs and evolve from common questions faced by employers in the commonwealth."

Lloyd "Chip" Aubry Jr., an attorney with Morrison & Foerster in San Francisco, expected a federal regulation to resemble California's recent emergency regulation. California's rule "imposes standards on all employers rather than Virginia's, which allows employers to self-assess their level of risk," he said.

Hobbs said that a federal emergency temporary standard from OSHA likely would encompass:

- Protective equipment.
- Administrative controls like distancing, circulation of employees in limited numbers and requiring work from home when feasible.
- Sanitation and housekeeping.
- Employee training.

Additional topics that might be addressed, though Hobbs said these are less likely to be considered, are:

- Case reporting to OSHA.
- Engineering controls like the speed and regularity of movement of air in a workspace.
- The treatment of employee time off for quarantining or recovery.

"The emergency regulations might also mandate the use of face coverings, although that is more of an open question," said John Ho, an attorney with Cozen O'Connor in New York City.

Eric Conn, an attorney with Conn Maciel Carey in Washington, D.C., said that it's "almost a guarantee there will be an emergency temporary standard under the Biden administration." He said that OSHA under the Trump administration already has been drafting an emergency temporary standard proposal in anticipation of a possible deal on the next stimulus package—for example, granting employer liability immunity in exchange for a standard. That work might be a model for an emergency temporary standard in the Biden administration.

Alternatively, Doug Parker, California OSHA chief, is on Biden's transition team and California's emergency temporary standard may be a model for a federal standard. There's a "decent chance" Parker will be named assistant secretary of OSHA, Conn added.

An assistant secretary of OSHA was not confirmed during the Trump administration, so there wasn't as much deregulation as some expected, he said.

Increased Enforcement

One commitment the Biden campaign has said it will make is to double the number of OSHA enforcement staff. "While that size of increase is unlikely, some increase is certain," Hobbs said.

Todd Logsdon, an attorney with Fisher Phillips in Louisville, Ky., said he expected the hiring of 200 to 250 more inspectors. "Once trained—maybe 18 months later—we would expect to see more inspections," he said.

The number of OSHA inspectors will depend on the budget Congress approves for OSHA, noted Jonathan Snare, an attorney with Morgan Lewis in Washington, D.C.

"We would suspect that the Biden administration—based on close ties to labor and labor unions—would prefer to increase the number of inspectors, but the final budget framework drives the end result," he said. "While the Biden Department of Labor and OSHA leadership could shift some of the current OSHA staff to enforcement from other duties, ultimately the budget is the key factor that will drive the number of inspectors."

"OSHA is inundated with complaints right now," Genderson said. In order to avoid exposing OSHA inspectors to COVID-19 risks in the field, the agency is limiting the number of onsite inspections. "Although we've recently observed an uptick in onsite inspections in certain industries, OSHA is largely responding to complaints right now by sending employers what are known as informal 'phone fax' letters instead."

Employers may respond in writing to the allegations against them related to COVID-19. Organizations can submit written descriptions of what they're doing to combat COVID-19, any written COVID-19 plan, employee training materials, training logs, or photographs of face coverings and social distancing signs, for example, she said.

"In large part, OSHA closes out complaints after receiving an employer submission," she said. If the Biden administration adds more inspectors, this likely will lead to more extensive onsite inspections, Genderson predicted.

[SHRM members-only article: "What You Need to Know About ... OSHA" (www.shrm.org/ResourcesAndTools/tools-and-samples/need-to-know/Pages/What-You-Need-to-Know-About-OSHA.aspx)]

Permanent Infectious Diseases Standard

A temporary emergency standard will provide the impetus for a permanent infectious diseases standard to be drafted, according to Conn.

"A permanent infectious diseases standard would be a bigger lift than a temporary standard because before issuing such a standard, the administration would have to establish significant risk of harm, economic feasibility and technological feasibility," Snare said. "Although it's by no means impossible, each of these becomes more difficult to establish outside of the context of the current global pandemic. Indeed, if the past is any guide, OSHA has tried and failed in prior efforts to complete rulemaking on a permanent infectious standard."

But Genderson added, "The COVID-19 pandemic has created unusual momentum for the agency to take another look at this permanent rulemaking approach. At a minimum, COVID-19 has focused everyone on the benefits of having workplace infectious disease plans in place and ready to go before an emergency."

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