

Employers can expect OSHA to issue emergency rule for COVID-19 early in Biden administration

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COVID-19 cases in the United States have been increasing rapidly in recent weeks, and the surge is expected to continue into the winter. On Nov. 15, 2020, the rolling seven-day average of confirmed cases was at an all-time high. Almost 69,000 individuals are hospitalized for COVID-19, the most since the pandemic began. Fatalities from COVID-19 are widely anticipated to rise in the coming weeks.

The Trump Administration's Occupational Safety and Health Administration (OSHA) has been criticized for not doing enough to respond to the pandemic and for refusing to adopt an emergency temporary standard for COVID-19 workplace safety. According to critics, OSHA's approach of providing optional guidelines for employers has been out of sync with the seriousness of the pandemic.

The agency has defended its actions, noting that it has conducted inspections and cited employers under the general duty clause of the Occupational Safety and Health Act for failure to follow OSHA and Centers for Disease Control and Prevention (CDC) guidance on COVID-19-related precautions. The agency has also inspected and cited employers under existing standards for COVID-19-related violations, such as the respiratory, personal protective equipment, and recordkeeping standards. On Nov. 6, 2020, OSHA announced that it has inspected 179 workplaces since the start of the pandemic—mostly long-term care and medical facilities—and issued \$2.5 million in fines.

Employers can expect that once President-elect Biden is inaugurated, OSHA's top priority will be to issue a specific standard for COVID-19 that will remain in effect until the pandemic subsides. The new rule could be implemented even before a new Secretary of Labor and/or Assistant Secretary for Occupational Safety and Health are confirmed by the Senate.

An emergency standard may make compliance with OSHA and CDC guidance on COVID-19 protections mandatory for employers, including requiring that all employees wear masks and socially distance. It may also compel employers to:

- Develop detailed plans to reduce the spread of the virus at work and submit the plans to the agency;
- Report all employees who test positive or have symptoms of COVID-19 to the agency; and
- Provide specific employee training.

Employers can also expect the Biden Administration's OSHA to aggressively pursue employee complaints about COVID-19 exposure at work, hiring more inspectors and conducting more inspections; issuing more citations and penalties; and publicly releasing information about cited employers in an effort to "shame" them.

Three state occupational safety and health agencies have created emergency temporary COVID-19 safety standards and others are in the process of creating such standards. And in all states, even before the change in administrations, employers should prepare for additional OSHA inspections and citations under existing standards as the disease becomes more widespread.

The best way for employers to protect workers and stay ahead of OSHA enforcement, and to minimize the risk of related civil and criminal liability, is to pay careful attention to OSHA and the CDC's COVID-19-related guidance, understanding that the guidance may soon be revised to place more obligations on employers and that it may soon become mandatory. Nexsen Pruet's employment and labor law team stands ready to assist if you have questions about OSHA compliance.