



Morgan Lewis

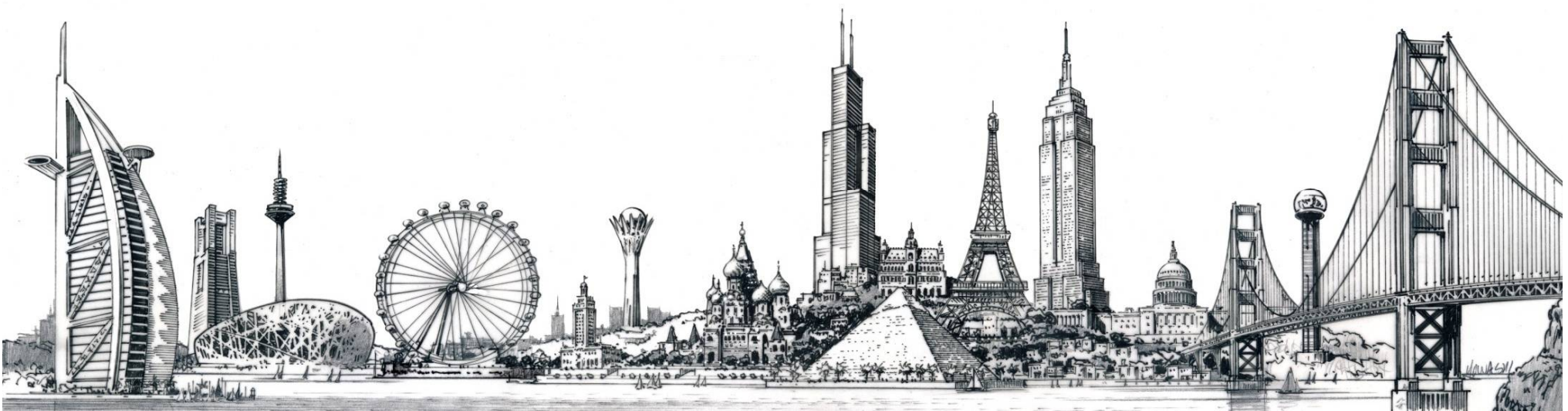
NAVIGATING THE NEXT.

The DOL and Workplace Compliance Standards: The “New” OSHA

December 11, 2020

Morgan Lewis

PART I: MEET THE NEW BOSS. SAME AS THE OLD BOSS.



DOL Leadership Under Obama



- Thomas Perez, Secretary of Labor
 - Previous work:
 - Federal prosecutor for DOJ Civil Rights Division
 - Director of Office for Civil Rights at DHHS
 - Maryland Secretary of Labor
 - Assistant Attorney General for DOJ Civil Rights Division
 - Has supported aggressive OSHA enforcement

Potential DOL Leadership under Biden



Sharon Block



Patrick Gaspard



Seth Harris

Morgan Lewis

OSHA Leadership Under Obama



Dr. David Michaels

Asst. Secretary
for OSHA



Dorothy Dougherty

Deputy Asst. Secretary
for OSHA



M. Patricia Smith

Solicitor of Labor

Potential OSHA Leadership Under Biden



Dr. David Michaels



Ann Rosenthal



Douglas Parker

OSHA Leadership – Back to the Future?



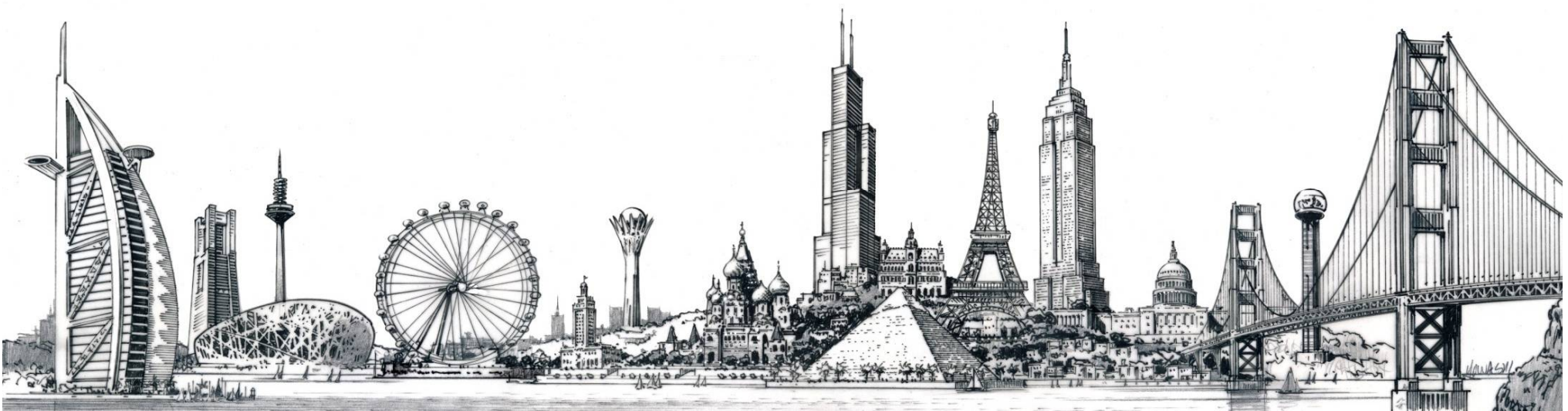
"One could write a book about the hazards that OSHA has failed to regulate adequately."

Dr. David Michaels, testimony before the Senate Health, Education, Labor and Pension Committee, 2007

- *Dr. David Michaels, Assistant Secretary of Labor for OSHA, confirmed December 2009*
- Longest-serving Assistant Secretary in OSHA's history
- Overview of priorities and initiatives:
 1. Rulemaking was a major priority
 - Silica standard became final on 3/25/16
 2. Employer Recordkeeping National Emphasis Program
 - He increased the investigation of employer underreporting of workplace injuries and illnesses.
 3. Enforcement initiatives included temporary workers and whistleblowers.
 4. Expanded use of the General Duty Clause to address workplace hazards not currently subject to OSHA standard (such as ergonomics and workplace violence).

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**PART II:
OSHA'S COVID-19 RESPONSE -
PAST AND FUTURE**



Relevant OSHA Standards

- There is no one clear OSHA standard governing respiratory diseases like COVID-19.
- Several relevant OSHA standards
 - a) “General Duty” to Keep Employees Safe
 - b) PPE Requirements
 - c) Respiratory Protection Standard
 - d) Recordkeeping and Reporting
 - e) Housekeeping
 - f) Hazard communication for cleaning products

Through November 12, 2020, OSHA has issued 232 COVID-19 related citations with total proposed penalties of \$3,148,452.

General Duty Clause

- Under Section 5(a)(1) of the OSH Act, also known as the General Duty Clause, all employers in the United States must provide a workplace “***free from recognized hazards*** that are causing or are likely to cause death or serious physical harm.”
 - General “catch-all” requirement.
 - OSHA looks to guidance from agencies like CDC to determine liability under this standard

OSHA Recommendations

- Develop an Infectious Disease Preparedness and Response Plan
 - Plans should address various risk factors associated with worksite and job tasks; steps to control risk and accommodate workers
- Implement basic infection prevention measures.
 - Promote frequent and thorough hand washing and respiratory etiquette (covering coughs; sneezing into tissue; etc)
 - Encourage workers to stay home if they are sick and report illness to employer
 - Consider telecommuting, staggered shifts, increased physical distance
 - Do not share tools and equipment
 - Increase routine cleaning and disinfecting using EPA-approved products

OSHA Recommendations (con't)

- Develop plan to identify and isolate sick people
 - Require self-reporting of COVID19 symptoms, diagnosis and exposures
 - Consider wellness and temperature checks
 - Develop steps following workplace exposure (contact tracing, communication to workforce, prompt isolation, sending employees home, deep cleaning, potential shut down, testing etc.)
- Limit spread of respiratory secretions
 - “Provide a face mask, if feasible and available,” and ask the person to wear it, if tolerated.
 - Note: A face mask is not PPE. A face mask protects others, and not the wearer.
 - Determine whether additional PPE is necessary
 - More on this later.

OSHA Recommendations Steps (con't)

- Use “Administrative Controls”
 - Establishing flexible work arrangements
 - Encourage sick OR exposed employees to stay home with sick leave and telework options
 - Virtual meetings when possible
 - Establishing alternating days or extra shifts
 - Training on all recommended steps and COVID-19
- Use “Engineering Controls”
 - Installing high-efficiency air filters.
 - Increasing ventilation rates in the work environment.
 - Installing physical barriers, such as clear plastic sneeze guards.
 - Specialized negative pressure ventilation in some settings, such as for aerosol generating procedures (e.g., airborne infection isolation rooms in healthcare settings and specialized autopsy suites in mortuary settings).

OSHA Requires All Employers to Conduct PPE Hazard Assessment, 29 CFR 1910.132(d)

- Hazard Assessment
 - Employers must assess the workplace to determine if hazards are likely to be present that require PPE
 - If so, select PPE, communicate selection decision to employees, and ensure that PPE fits
 - Employer must verify that “the required workplace hazard assessment has been performed through a **written certification**,” which:
 - Identifies workplace evaluated; the person who conducted the evaluation; the dates of the evaluation
 - Document must say “certification of hazard assessment.”
- If employer requires PPE, training, cleaning, storage and other requirements apply.

OSHA & COVID-19 PPE

- OSHA Guidance on Preparing Workplaces for COVID-19 (March 2020),
<https://www.osha.gov/Publications/OSHA3990.pdf>
 - “Examples of PPE include: **gloves, goggles, face shields, face masks, and respiratory protection, when appropriate.** During an outbreak of an infectious disease, such as COVID-19, recommendations for PPE specific to occupations or job tasks may change depending on geographic location, updated risk assessments for workers, and information on PPE effectiveness in preventing the spread of COVID-19.”
- OSHA Guidance on Returning to Work (June 2020),
<https://www.osha.gov/Publications/OSHA4045.pdf>
 - “Employers must determine if PPE (such as **gloves, surgical masks, and face shields**) is necessary for employees to work safely after considering whether engineering and administrative controls and safe work practices (such as social distancing or the use of cloth face coverings) can effectively mitigate identified hazards.”

OSHA Recording & Reporting Requirements

- OSHA requires recording and reporting certain COVID-19 illnesses if they are work-related
 - Report death within 8 hours
 - Report in-patient hospitalization (not just ER trip), loss of eye or amputation within 24 hours
 - Record if required to maintain OSHA 300 logs and other criteria are met
- Must evaluate whether employee was exposed at work
 - If an employer cannot determine whether it is more likely or not that an employee's illness is work-related, the employer should not record the illness.

A Federal Emergency Temporary Standard?

- California
 - Issued Emergency COVID-19 Prevention Regulations on November 30
 - Required a written prevention program, requirements for outbreaks and major outbreaks, and prevention measures in employer-provided housing and transportation
- Oregon
 - Issued Temporary Rule Addressing COVID-19 Workplace Risks on November 16
 - Required distancing, face coverings, ventilation, exposure risk assessment, infection control plan, training, notification, testing, and medical removal.
- Michigan
 - Issued 11 Emergency Rules in October after Gov.'s executive orders were ruled unconstitutional
 - Required workplace exposure determinations, written COVID-19 preparedness and response plans, and implementing workplace protections
- Virginia
 - Finalized Emergency Temporary Standard in July
 - Required exposure assessment, notification requirements, social distancing, and sanitizing requirements

A Federal Emergency Temporary Standard?

- Federal ETS Generally
- Why would it be an “emergency” standard?
 - A typical standard takes 7 years and 9 months to be issued
 - Generally, after a standard is published, it takes 3 years and 3 months
 - When is an emergency standard permitted?
 - Secretary of Labor must determine employees are “exposed to grave danger” and an emergency standard is necessary to protect employees from that danger.
 - How do you receive notice?
 - It is published in Federal Register
 - What happens after it is issued?
 - Valid for 6 months
 - OSHA must issue a permanent standard within 6 months
 - Usually challenged in court (more on this later)

A Federal Emergency Temporary Standard

- History of ETS

Table A-1. OSHA Emergency Temporary Standards (ETS)

Year	Subject of ETS	Federal Register Citation of ETS	Result of Judicial Review	Judicial Review Case Citation
1971	Asbestos	36 <i>Federal Register</i> 23207 (December 7, 1971)	Not challenged	—
1973	Organophosphorous pesticides	38 <i>Federal Register</i> 10715 (May 1, 1973); amended by 38 <i>Federal Register</i> 17214 (June 29, 1973)	Vacated	<i>Florida Peach Growers Ass'n v. United States Department of Labor</i> , 489 F.2d 120 (5 th Cir. 1974)
1973	Fourteen carcinogens	38 <i>Federal Register</i> 10929 (May 3, 1973)	Twelve upheld, two vacated	<i>Dry Color Mfgs. Ass'n v. Department of Labor</i> , 486 F.2d 98 (3d Cir. 1973)
1974	Vinyl chloride	39 <i>Federal Register</i> 12342 (April 5, 1974)	Not challenged	—
1976	Diving operations	41 <i>Federal Register</i> 24271 (June 15, 1976)	Stayed	<i>Taylor Diving & Salvage Co. v. Department of Labor</i> , 537 F.2d 819 (5 th Cir. 1976)
1977	Benzene	42 <i>Federal Register</i> 22515 (May 3, 1977)	Stayed	<i>Industrial Union Dep't v. Bingham</i> , 570 F.2d 965 (D.C. Cir. 1977)
1977	1,2 Dibromo-3-chloropropane (DBCP)	42 <i>Federal Register</i> 45535 (September 9, 1977)	Not challenged	—
1978	Acrylonitrile (vinyl cyanide)	43 <i>Federal Register</i> 2585 (January 17, 1978)	Stay denied	<i>Vistrion v. OSHA</i> , 6 OSHC 1483 (6 th Cir. 1978)
1983	Asbestos	48 <i>Federal Register</i> 51086 (November 4, 1983)	Stayed	<i>Asbestos Info. Ass'n v. OSHA</i> , 727 F.2d 415 (5 th Cir. 1984)

Source: CRS with data from Mark A. Rothstein, "Substantive and Procedural Obstacles to OSHA Rulemaking: Reproductive Hazards as an Example," *Boston College Environmental Affairs Law Review*, vol. 12, no. 4 (August 1985), p. 673.

A Federal Emergency Temporary Standard?

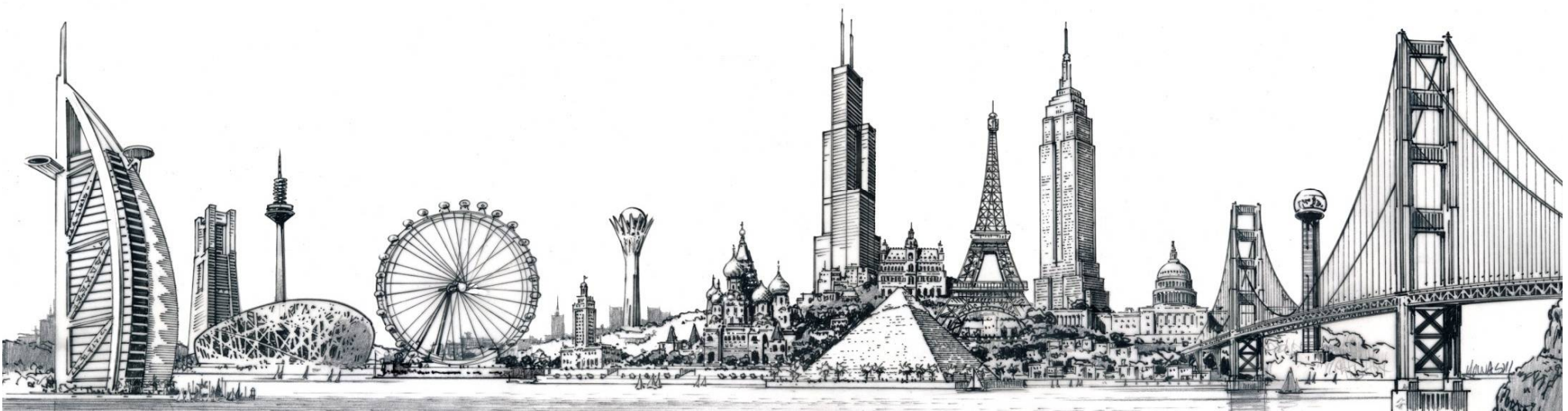
- What would be in a COVID-19 ETS?
 - It may not even be a “COVID-19” ETS
 - OSHA had started a more general infectious standard under Dr. Michaels and could revert to providing more general guidance rather than disease specific
 - When initially drafted the general infectious disease standard applied to healthcare facilities, but it would most likely be broadened
 - Most likely would mirror many requirements of states’ ETS and mandate OSHA’s prior recommendations
 - Infection Control Plan
 - Apply Hierarchy of Controls
 - Mandate CDC guidance, including ventilation, physical distancing, PPE, sanitation, and disinfection

A Federal Emergency Temporary Standard

- Would it be upheld?
 - OSHA has already argued in public documents that one is not needed
 - Secretary Scalia issued a press release that OSHA already had all it needed to combat the pandemic
 - Department of Labor argued in court that an ETS was not necessary
 - Impact of vaccine?
- How would it be enforced?
 - Targeted inspections of select industries, e.g. nursing homes, farms, and meat factories
 - Citations released within “weeks” of inspection (as opposed to months)
 - Randomly chosen follow-up on-site inspections after phone/fax complaint
 - Press releases

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PART III: OSHA'S NON-COVID FUTURE



Most Enforced Standards Will Likely Remain The Same

1. **Fall Protection, construction** (29 CFR 1926.501) [[related OSHA Safety and Health Topics page](#)]
2. **Hazard Communication Standard, general industry** (29 CFR 1910.1200) [[related OSHA Safety and Health Topics page](#)]
3. **Scaffolding, general requirements, construction** (29 CFR 1926.451) [[related OSHA Safety and Health Topics page](#)]
4. **Control of Hazardous Energy (lockout/tagout), general industry** (29 CFR 1910.147) [[related OSHA Safety and Health Topics page](#)]
5. **Respiratory Protection, general industry** (29 CFR 1910.134) [[related OSHA Safety and Health Topics page](#)]
6. **Ladders, construction** (29 CFR 1926.1053) [[related OSHA Safety and Health Topics page](#)]
7. **Powered Industrial Trucks, general industry** (29 CFR 1910.178) [[related OSHA Safety and Health Topics page](#)]
8. **Fall Protection–Training Requirements** (29 CFR 1926.503) [[related OSHA Safety and Health Topics page](#)]
9. **Machinery and Machine Guarding, general requirements** (29 CFR 1910.212) [[related OSHA Safety and Health Topics page](#)]
10. **Eye and Face Protection** (29 CFR 1926.102) [[related OSHA Safety and Health Topics page](#)]

OSHA Inspections May Increase Slightly

OSHA Inspection Statistics	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018
Total Inspections	39,228	36,163**	35,820	31,948	32,408	32,023
Total Programmed Inspections	22,170	19,222	16,527	12,731	14,377	13,956
Total Unprogrammed Inspections	17,058	16,941	19,293	19,217	18,031	18,067
~ Fatality/Catastrophe Inspections	826	850	912	890	837	941
~ Complaints Inspection	9,505	9,570	9,037	8,870	8,249	7,489
~ Referrals*	4,024	3,829	6,569	6,691	6,286	6,463
~ Other Unprogrammed Inspections	2,703	2,525	3,686	2,766	2,659	3,174

*As of FY 2015 referral inspections encompass all subtypes of referrals such as those received from compliance safety and health officers, safety and health agencies, other city/county/state/federal governments, media, and employer-reported.

** The October 2013 Government shutdown occurred during this time.

Whistleblower Actions May Increase

- OSHA oversees more than 20 anti-retaliation statutes
- Dr. Michaels has called more increased funding and cooperation among other federal agencies to help resolve a long backlog of cases

Other Forthcoming Standards and Developments?

- IIPP?
- Lowered PELs?
- Revised Recordkeeping?
- Union Walkaround Rights?

Presenter



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Brandon J. Brigham represents employers in discrimination, whistleblower, retaliation, and ERISA claims. He has particular experience litigating unfair competition matters on behalf of pharmaceutical, retail and financial services clients. Brandon also provides counsel to manufacturing, construction, retail, and refining companies on matters arising under OSHA, including advice regarding worksite investigations, compliance, and safety and health plans. He counsels on US federal and state employment laws such as the ADA, FMLA, and the New Jersey Law Against Discrimination.

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