



Morgan Lewis

# NAVIGATING THE NEXT.

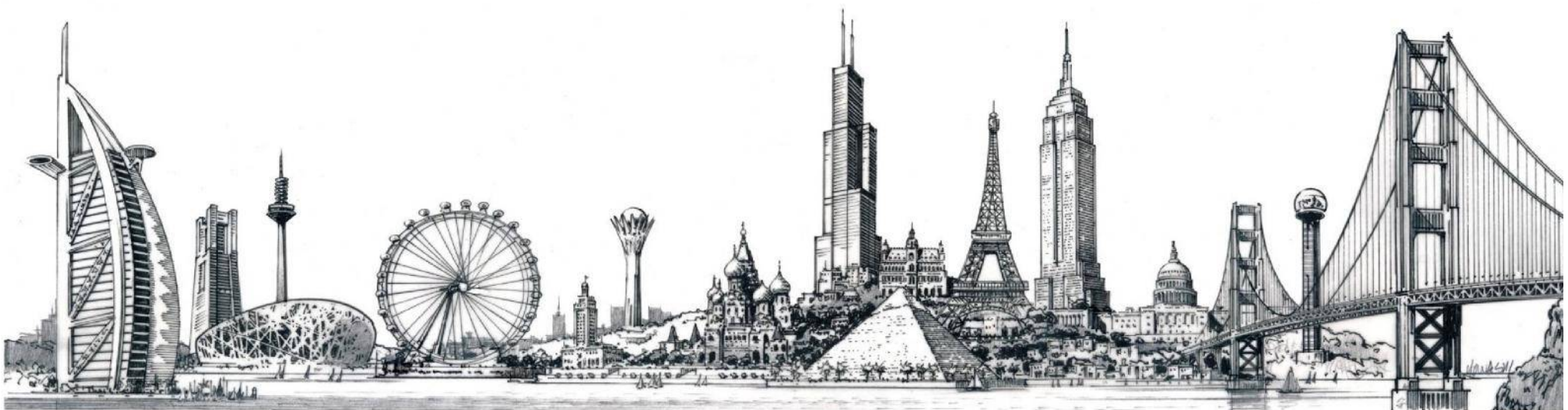
## The DOL and Workplace Compliance Standards: The “New” OSHA

November 12, 2021



**Morgan Lewis**

# **PART I: DOL LEADERSHIP UNDER BIDEN**



# DOL Leadership Under Biden



- Martin Walsh, Secretary of Labor
- Previous work:
  - Mayor of the City of Boston
  - Massachusetts State Representative

# DOL Leadership Under Biden



- Seema Nanda, Solicitor of Labor
- Previous work:
  - Served in the roles of U.S Department of Labor Chief of Staff, Deputy Solicitor, and Deputy Chief of Staff and Senior Advisor to the Secretary during the Obama Administration
  - Led the Justice Department's Office of Immigrant and Employee Rights

# OSHA Leadership Under Biden



Douglas L. Parker

Asst. Secretary  
for OSHA



James Frederick

Deputy Asst. Secretary  
for OSHA

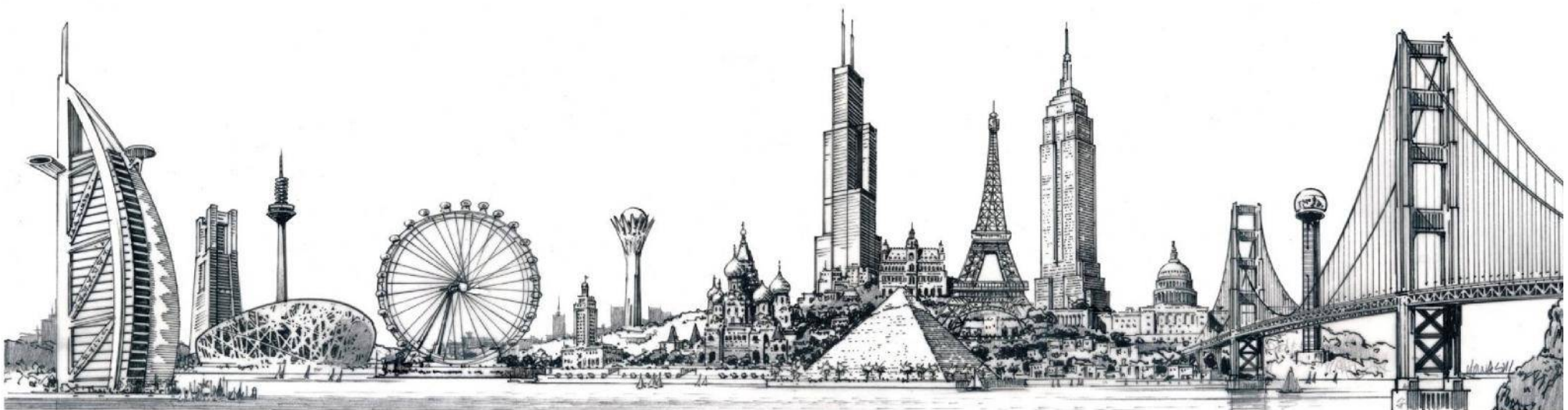


Amanda Edens

Deputy Asst. Secretary  
for OSHA

**Morgan Lewis**

# **PART II: OSHA'S COVID-19 EMERGENCY TEMPORARY STANDARD**



## **Landmark OSHA Emergency Temporary Standard (ETS) Requires COVID-19 Vaccination or Testing**

The ETS requires **covered employers with 100+ employees** to establish a vaccine policy by **December 6, 2021** that requires by **January 4, 2022**:

- Mandatory vaccination
- Weekly testing for unvaccinated employees





## Applicability of Federal OSHA Plan



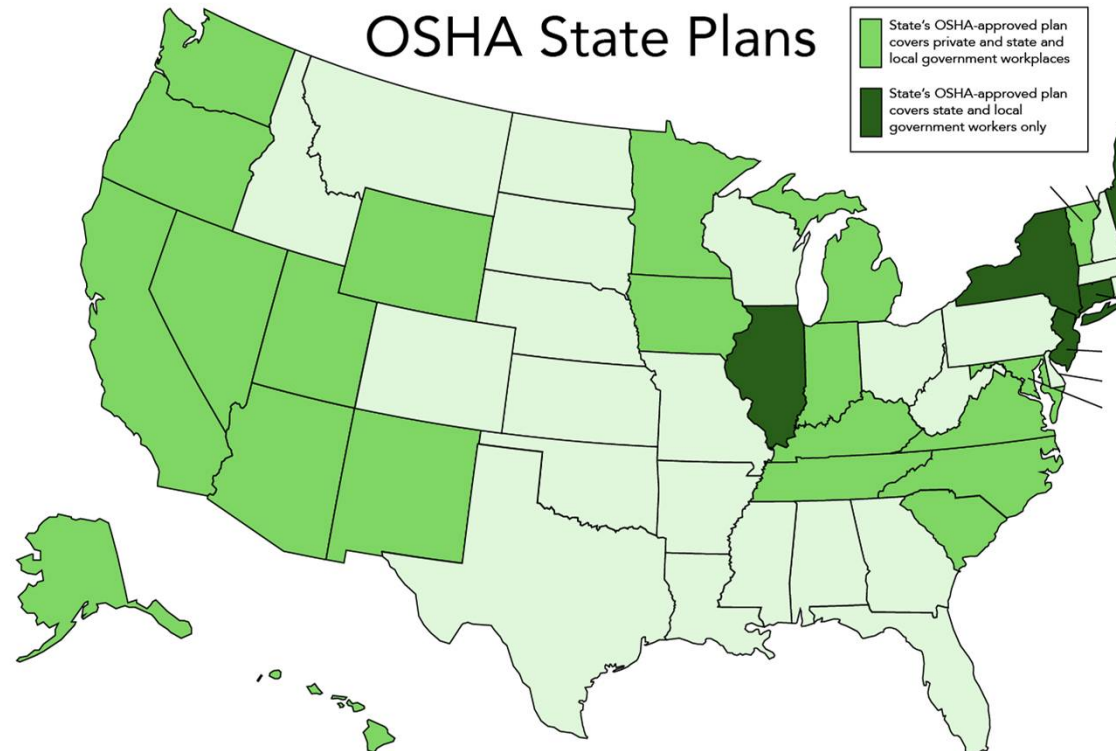
### Key term: “covered employers”

- OSHA ETS applies to all employers with 100+ US-based employees
- OSHA ETS and related OSHA FAQs explain that employers **must** count:
  - All employees (not just those at a single location)
  - All employees (regardless of vaccination status)
  - Any employee employed while the ETS is in effect (ie, seasonal workers)
  - Part-time workers
  - Minors



# OSHA State Plans

- There are 22 OSHA-approved State Plans covering private and public workers.
- Each must either adopt (1) the federal OSHA ETS or (2) an ETS that is at least as effective as the federal OSHA ETS.
- State Plans must notify OSHA of their intended action by November 20, 2021.
- Adoption must be complete by December 5, 2021.



# Under the Emergency Temporary Standard, there are new requirements and guidelines for:

<b>01</b>	<b>02</b>	<b>03</b>	<b>04</b>	<b>05</b>	<b>06</b>
<b>Vaccinations</b>	<b>Testing</b>	<b>Positive Test</b>	<b>Record-Keeping</b>	<b>Reporting</b>	<b>Disclosures</b>
<p>Covered employers must require workers to be fully vaccinated, <u>or</u> may adopt a policy allowing employees to choose either to get vaccinated or undergo weekly testing and wear a face covering</p> <p>Other items under vaccinations include requirements for paid time off, proof of vaccination</p>	<p>Unvaccinated workers must undergo weekly testing and wear a face covering</p> <p>Other items under testing include guidelines for acceptable tests and how they should be read and administered</p>	<p>Employees must promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19 by a licensed healthcare provider</p> <p>Other associated topics include removal from work and return to work guidelines</p>	<p>Employers must maintain a roster of the vaccination status and testing results of all employees, broken down by worksite, and must make certain records available to OSHA and employees if requested</p> <p>Other requirements specify turnaround time for providing these records</p>	<p>Employers must report all work-related COVID-19 fatalities and hospitalizations to OSHA within 8 hours and 24 hours, respectively</p>	<p>Employers must provide each employee with specific information regarding the ETS, vaccinations, workplace policies, and related laws</p>

## ETS Vaccination Requirements

**Covered businesses with 100+ employees must require workers to be **fully vaccinated** or undergo weekly testing.**

 **Fully vaccinated:** An employee is considered **fully vaccinated** either **two weeks after the Johnson & Johnson vaccine** or **two weeks after the second dose of the two-shot vaccination**.

Note – the ETS allows for a limited exception to the “fully vaccinated” requirement – if an employee has had their final dose in a vaccine series by January 4, 2022, they do not need to undergo weekly testing even if they have not yet completed to two-week period after the final dose to be “fully vaccinated.”

*Effective January 4, 2021*

## Vaccinations

### Required PTO Benefits

Employers must support vaccination by providing “**reasonable time**” during work hours for vaccination and recovery.



**Time for vaccination:** OSHA ETS requires employers to provide “reasonable time” during work hours, **up to four hours of paid time off**, for employees to receive **each** of their primary vaccine dose(s).



**Time for recovery:** OSHA ETS requires employers to provide “reasonable time and paid sick leave” to **recover from side effects** associated with each primary vaccine dose.

*Effective December 6, 2021*



### Face Covering Requirement

**Employers must ensure each employee who is not fully vaccinated wears a face covering** when indoors or when occupying a vehicle with another person for work purposes.

Exceptions apply when an employee is actively eating or drinking or when alone in a room with floor-to-ceiling walls and a closed door.

*Effective December 6, 2021*

## Proof of Vaccination

Covered employers must determine employee vaccination status based on employee **proof of vaccination**.



### **Proof of vaccination is defined as:**

- **Record of immunization** from a healthcare provider or pharmacy
- Copy of US COVID-19 **Vaccination Record Card**
- Copy of **medical records documenting vaccination**
- Copy of **immunization records** from a public health, state, or tribal immunization info system, or
- Copy of any other **official documentation** that contains the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s).

*Effective December 6, 2021*

## ETS Provides One Exception to Proof of Vaccination Requirements:

- OSHA ETS says that if an employee is unable to produce acceptable proof of vaccination (for example, because their card was lost or stolen), they can submit a signed and dated statement.
- OSHA ETS requires employee statements to:
  - Attest to their vaccination status
  - Attest that they have lost or are otherwise unable to produce proof required by the ETS, and
  - Include the following statement: “I declare that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.”
  - Include, to the best of the employee’s recollection:
    - The type of vaccine administered,
    - Date(s) of administration,
    - The name of the health care professional(s) or clinic site(s) administering the vaccine(s).

*Effective December 6, 2021*

## Testing Requirements for Unvaccinated Individuals

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**Workers who are not fully vaccinated must undergo weekly **COVID-19 testing** and wear a face covering.**

- Employers may choose to assume costs, but **the ETS does not require employers to pay for any costs associated with testing.**
- ETS says that payment for testing may be required by other laws.

*Effective January 4, 2022*



## Testing



### COVID-19 Tests: What types of tests are allowed?

The OSHA ETS says that **COVID-19 tests must be:**

- Cleared, approved, or authorized, including in an Emergency Use Authorization, by the FDA to detect current infection of COVID-19;
- Administered in accordance with the authorized instructions; and
- **Not** both self-administered and self-read **unless** observed by the employer or an authorized telehealth proctor.

Self-administered tests (for example, at home tests) are **only** allowed if sent to a laboratory for results, or collection and results are observed by the employer or an authorized telehealth proctor.

FDA-approved rapid antigen tests **are** permitted (if administered as described above), but antibody tests are **not** permitted

*Effective January 4, 2022*

**Positive  
Test****Removal Requirements**

**Employees must promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19 by a licensed healthcare provider.**

**ETS requires employers to immediately remove these employees from the workplace and allow them to return only after they meet the return to work requirements.**

*Effective December 6, 2021*

## Positive Test



### Return to work requirements

ETS says removed **employees may only return after they:**

- Meet the return-to-work criteria published in the CDC's Isolation Guidance (i.e., *for symptomatic cases, at least 10 days since symptoms first appears, no fever for 24 hours without fever-reducing medication, and other symptoms have improved* **or** *for asymptomatic cases, at least 10 days since test specimen was provided*);
- Receive a recommendation to return to work from a licensed healthcare provider; **or**
- Obtain a negative test result on an NAAT (i.e., PCR) test after having received a positive antigen test result.

*Effective December 6, 2021*

## Other Record-Keeping Requirements

**The ETS requires employers to preserve the following while the ETS remains in effect:**

- (1) Vaccine records
- (2) The records of **each** COVID-19 test result for **each** unvaccinated employee

*Effective December 6, 2021*



## **Other Record-Keeping Requirements**

The ETS requires employers to maintain a record of each test result, but note that self-administered tests may not automatically generate a record.

Consider contacting counsel on record retention requirements.

**The ETS confirms that vaccine and testing records are confidential employee medical records. Consult with counsel to ensure compliance with privacy laws, such as HIPAA.**

*Effective December 6, 2021*

## **Other Record-Keeping Requirements**

The ETS requires employers to maintain a roster (*by worksite*) of the vaccination status of all employees showing if they are:

- Fully vaccinated,
- Partially (not fully) vaccinated,
- Not fully vaccinated because of a medical or religious accommodation, or
- Not fully vaccinated because they have not provided acceptable proof of their vaccination status

*Effective December 6, 2021*

## **Other Record-Keeping Requirements**

**The ETS requires employers to make the following available (1) to employees by the end of the next business day, and (2) to OSHA within 4 hours:**

- An employee's own **vaccine and testing documentation**
- The **aggregate number of fully vaccinated employees** at a workplace along with the **total number of employees at that workplace**

*Effective December 6, 2021*

## **Hospitalization & Fatality Reporting Rules**

The OSHA ETS requires employers to report each **work-related** COVID-19:

- fatality to OSHA **within 8 hours of *learning* about the fatality.**
- in-patient hospitalization to OSHA **within 24 hours of *learning* about the in-patient hospitalization.**

*Deadline: December 6, 2021*



## Required Employee Disclosures

ETS requires employers to inform employees (in a language and at a literacy level the employee understands) of:

- The **requirements of the ETS**;
- The **employer's related policies and procedures**;
- The **safety, efficacy, and benefits of COVID-19 vaccination**;  
Must provide "Key Things to Know About COVID-19 Vaccines" *available on the CDC website and will be included in recap of webcast*
- **Paid time off entitlements for vaccination and recovery** from side effects;
- **Anti-retaliation protections**;
- The prohibitions and **criminal penalties for knowingly supplying false statements or documentation**; and
- The **types of records employees are entitled to** and **procedures for requesting such records**.

*Effective December 6, 2021*

# Enforcement & Penalties

- The ETS, its Preamble, and FAQs outline potential penalties for employers or employees
- Employers may be subject to the following penalties for violating the ETS:
  - Up to \$13,653 per Serious or Other-Than-Serious (OTS) violations
  - Up to \$136,653 per Willful or Repeat violations
  - Potential use of “egregious violation” policy
- Employers may be subject to criminal penalties for knowingly accepting false documentation related to vaccine status
- Employees may be subject to criminal penalties for knowingly providing false information to employers regarding vaccine status

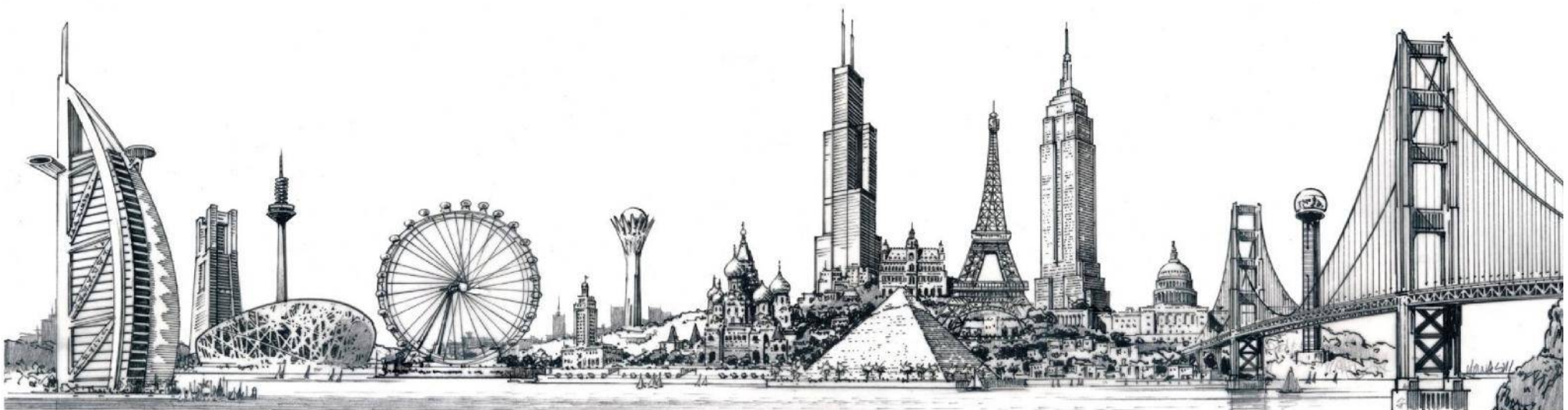
# Questions

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- **Business-Specific Questions Not Addressed In This Presentation:**
  - How to count employees for 100+ employee threshold?
  - The ETS says “The employer must maintain a record of each [COVID-19] test” for unvaccinated workers. What constitutes a test “record” for self-administered tests?
  - What steps does an employer have to take to comply with state or federal laws on testing or collecting vaccine information for minors?
  - What obligations do I have under federal or state law to pay for COVID-19 tests and testing time, if any?
  - What if the state where I am located has a law prohibiting employer COVID-19 tests, vaccination requirements, mask requirements, etc., in conflict with OSHA’s ETS? Does the OSHA ETS preempt state law?
  - What obligations, if any, do I have under HIPAA or privacy laws?
  - How to develop a PTO policy that complies with the technical requirements of the ETS?
- Consider contacting counsel for legal advice on these issues business.

**Morgan Lewis**

# **PART III: OSHA'S NON-COVID DEVELOPMENTS**



# 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. **Respiratory Protection, general industry** (29 CFR 1910.134) [[related OSHA Safety and Health Topics page](#)]
4. **Scaffolding, general requirements, construction** (29 CFR 1926.451) [[related OSHA Safety and Health Topics page](#)]
5. **Ladders, construction** (29 CFR 1926.1053) [[related OSHA Safety and Health Topics page](#)]
6. **Control of Hazardous Energy (lockout/tagout), general industry** (29 CFR 1910.147) [[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. **Eye and Face Protection** (29 CFR 1926.102) [[related OSHA Safety and Health Topics page](#)]
10. **Machinery and Machine Guarding, general requirements** (29 CFR 1910.212) [[related OSHA Safety and Health Topics page](#)]

# OSHA Inspections May Increase Slightly

OSHA Inspection Statistics	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020*
Total Inspections	35,280	31,948	32,408	32,023	33,393	21,674
Total Programmed Inspections	16,527	12,731	14,377	13,956	14,900	8,726
Total Unprogrammed Inspections	19,293	19,217	18,031	18,067	18,493	12,948
~ Fatality/Catastrophe Inspections	912	890	837	941	919	1,508
~ Complaints Inspection	9,037	8,870	8,249	7,489	7,391	4,581
~ Referrals*	6,569	6,691	6,286	6,463	6,718	4,808
~ Other Unprogrammed Inspections	3,686	2,766	2,659	3,174	3,465	2,051

\*The COVID-19 global pandemic caused by the novel coronavirus SARS-CoV-2 occurred during this time. FY20 enforcement OIS data is preliminary and as of November 9, 2020.

# New Rulemaking

- Exposure to Beryllium in Construction
  - Effective Aug. 31, 2020
    - Revised standards by removing or modifying provisions that were unnecessary or did not adequately address concerns in the industry.
    - Standard retains permissible exposure limit from 2017 final rule.
- Discrimination Against Employees Exercising Rights Under OSHA
  - Effective Sept. 3, 2021
    - Clarified causation standard in retaliation cases.
    - To prove a violation, the Secretary must show that *but for* the employee's protected activity they would not have suffered an adverse action. Previous language stated the protected activity must merely be a "substantial reason" for the adverse action.



# Proposed Rulemaking

- Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings
  - Comment period closes Dec. 27, 2021
    - Proposal to implement a heat standard for indoor and outdoor workers to mitigate hazardous heat exposure.
    - Aims to create proactive and preventative measures for employers to lower risk, such as altering work schedules, acclimatization, and use of personal protective equipment.
    - OSHA currently relies on the general duty clause to regulate this area.
- Tracking of Workplace Injuries and Illnesses
  - Forthcoming Notice of Proposed Rulemaking anticipated Dec. 2021
    - Proposal to reinstate 2016 rule requiring employers with 250+ employees to electronically submit OSHA form 300 (Log of Work-Related Injuries and Illnesses) and form 301 (Injury and Illness Incident Report).
- Walking Working Surfaces
  - Proposing changes to clarify the handrail and stair rail system requirements for new stair rail systems.

# OSHC Final Decisions

- MasTec North America, Inc., No. 15-1574 (OSHRC Mar. 2, 2021)
  - Vacated serious violation of Electric Power and Distribution Standard- MAD for failure to establish company's knowledge of violative condition.
  - Commission found the supervisor anticipated and warned of hazards and that company's work rules were sufficient by restating OSHA standards.
- StormForce of Jacksonville, LLC, No. 19-0593 (OSHRC Mar. 8, 2021)
  - Vacated fall protection violation.
  - Commission found employer did not have actual knowledge as a controlling employer not present on the day of the violation.
  - The employer exercised reasonable care to prevent or detect violative conditions by following its worksite inspection protocols.
- Shelly & Sands, Inc., No. 17-0190 (OSHRC Feb. 1, 2021)
  - Vacated fall protection violation.
  - Commission rejected arguments the employer had constructive knowledge of violation because it found the employer had a past practice of enforcing and disciplining violations and evidence the rule was communicated to employees.

# OSHC Final Decisions – Continued

- Roy Rock, LLC, No. 18-0068 (OSHRC July 22, 2021)
  - Vacated lockout/tagout violation and found the employee was still engaged in routine work of construction-related activities, not maintenance work.
  - Commission denied deference to Secretary's interpretation that the lockout/tagout requirement prior to "maintenance or repair activity" means *any task*.
- Angel Brothers Enterprises, Ltd., No. 16-0940 (OSHRC July 28, 2020)
  - Commission affirmed willful violation for failure to use trenchbox.

# Letters of Interpretations – General Standards

- Inspection Guidance for Heat Initiative
  - Regional OSHA offices to monitor “heat priority” days and make heat-related interventions and inspections on days when the heat index exceeds 80°F.
- Interim Guidance for 2020 Final Beryllium Standards
  - Provides guidance to OSHA officers enforcing the 2020 standards and updates definitions and provisions for general industry and where applicable construction.
    - Memo in effect until Beryllium compliance directive is issued.
- Beryllium Standards – Consuming Food and Beverages Onsite
  - Eating or drinking areas should be kept as free of beryllium as practicable and no employees should enter said areas with beryllium-contaminated PPE.
- Electrical Protective Equipment – Rubber Insulated Gloves
  - Testing protocol requires testing before first use and every six months after.  
If initially tested but not put into service, gloves must be tested within 12 months.

# Letters of Interpretations – Reporting Standards

- Enforcement Procedures for Failure to Submit Electronic Illness and Injury
  - OSHA offices will monitor and refer to reported 300A forms in the ITA database during inspections to identify non-reporting employers.
  - OSHA is also developing an analytic approach to identify non-responders from the prior year.
- Injury involving both work-related and non-work-related incidents
  - An injury or illness is presumed work-related if an event in the work environment is a discernible cause or a significant aggravation to a pre-existing condition.
  - The work event or exposure only needs to be a discernable cause; it does not need to be the sole cause.
- Reporting two related reportable events
  - A second event does not need to be reported so long as the employer initially reported the first event within 24 hours.
  - Employers must still record the most serious outcome for each case in their records.

# 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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