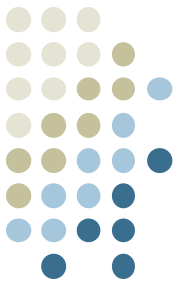


# OSHA'S EMERGENCY STANDARD & OTHER OSHA UPDATES

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Presented By:  
Matthew Horn  
SmithAmundsen LLC

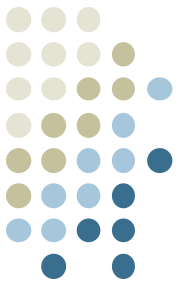
Visit Our COVID-19 Resource Center at  
[www.saLAWus.com](http://www.saLAWus.com)



## ● **Matthew Horn, Partner & Chair**

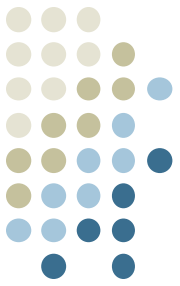
- Oversee a team helping clients in all industries across the country with their OSHA issues
- Goal with an OSHA inspection is to avoid the issuance of citations altogether, but when citations are issued, need to resolve them as intelligently as possible
- Services:
  - OSHA compliance counseling
  - OSHA inspection management
  - Evaluating and settling OSHA citations
  - Litigating OSHA citations
  - Assisting with crisis management
  - Resolving employee and union complaints
  - Defending whistleblower claims





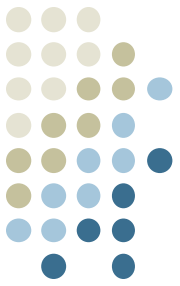
# OSHA UPDATES FOR 2021 & BEYOND

# OSHA UNDER BIDEN- Leadership

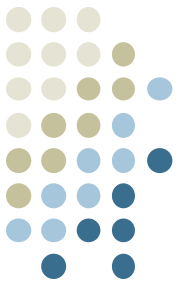


- Boston Mayor and former union leader Marty Walsh announced Labor Secretary in March, putting him in charge of OSHA
- Walsh backed by major unions across the country
- Expected to pursue a pro-union agenda and implement rules making it easier for employees to unionize
  - Already seen this with Amazon
  - Expect a focus on healthcare

# OSHA UNDER BIDEN- Expectations

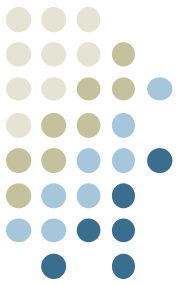


- Expect a continuation of the trajectory of OSHA under Obama:
  - more regulation, inspections, and citations, and
  - increased fines and repeat and willful citations
- Expect rules enacted by Obama but rescinded by Trump to surface again
  - i.e. rule requiring employers with more than 250 employees to electronically submit their 300 logs, as well as their 301s (in addition to the already-required information from their 300As)



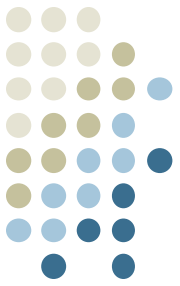
# OSHA'S EMERGENCY TEMPORARY STANDARD

# COVID-19 Emergency Temporary Standard (ETS)



- Biden ordered OSHA to release a COVID-19 Standard
  - June 10: Standard Released
  - June 21: Published to Federal Registry
  - July 6: Compliance with most sections required
  - July 21: Compliance with all remaining sections, including physical barrier, ventilation, and training requirements required

# ETS Summary

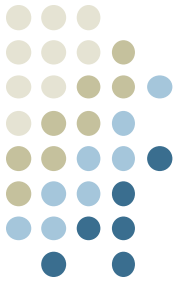


- Good News: ETS is largely a continuation of CDC and OSHA Guidance already in place
- Bad News: ETS makes it easier for OSHA to cite healthcare employers because it codifies the guidance—no longer need to rely on General Duty Clause
- Also, some new additions:
  - Paid “removal benefits”
  - COVID Log



# ETS Scope

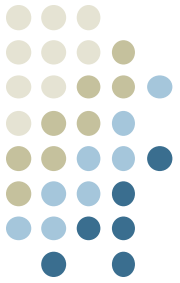
1910.502(a)



- It applies to all settings where employees provide healthcare services such as:
  - Hospitals
  - Nursing homes/long-term care facilities
  - Healthcare settings in a non-healthcare setting (clinic inside a retail setting)
  - Funeral homes, mortuaries, and morgues
- Exceptions do apply!

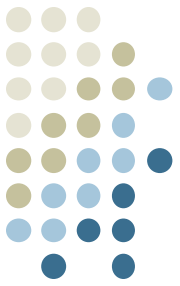
# ETS Scope Exceptions

1910.502(a)

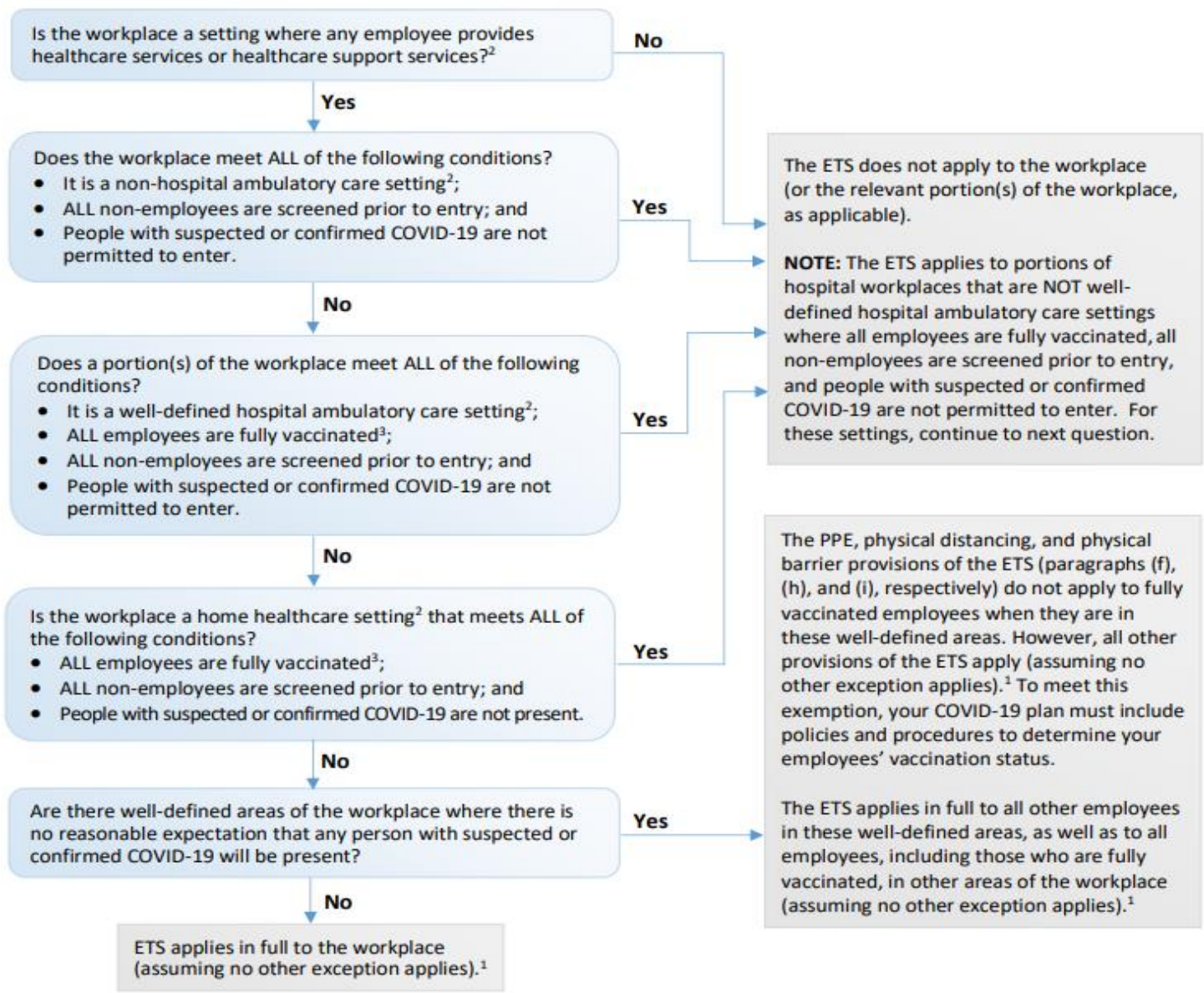
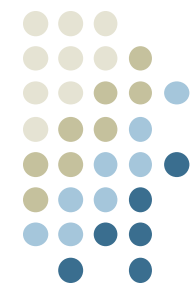


- Exceptions include:
  - First aid provided by a non-licensed provider
  - Pharmacy retail settings (Ex: Dispensing Medicine)
  - Non-hospital ambulatory care if non-employees are screened
  - Hospital ambulatory care if employees are fully vaccinated and non-employees are screened
  - Home healthcare settings if all employees are fully vaccinated and non-employees are screen
  - Telehealth/off-site healthcare support services (Ex: Medical Billing)

# Well Defined Area Exception

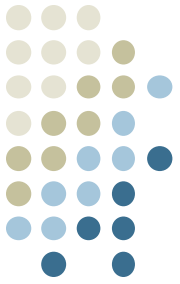


- In well-defined areas where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present, the following provisions do not apply:
  - Personal Protective Equipment (PPE) [1910.502(f)];
  - Physical Distancing [1910.502(h)]; and
  - Physical Barriers [1910.502(i)]



# COVID-19 Plan

1910.502(c)



- Employer's Written COVID-19 Plan must include:
  - Identified COVID/safety coordinator
  - Workplace hazard assessment
  - Input from non-managerial employees
  - Screening procedures for COVID-19 symptoms
  - Monitoring policies to ensure effectiveness
  - Policy to determine vaccination status
  - Cleaning/disinfection policies

# Patient Screening

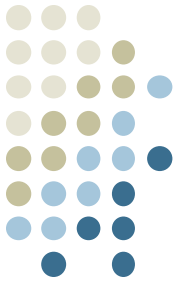
1910.502(d)



- When there is direct patient care, employers must:
  - Limit and monitor points of entry
  - Screen and triage all entrants to the workplace
  - Implement all other patient management policies in accordance with the CDC (Ex: Telehealth, Isolating Patients, Physical Distancing, etc.)

# Personal Protective Equipment (PPE)

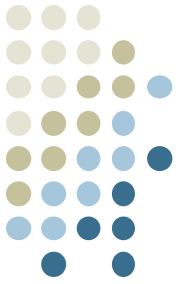
1910.502(f)



- Facemasks
  - Must be FDA approved/authorized
  - Must provide PPE to employees as necessary
  - Cover nose & mouth indoors or when occupying a vehicle for work purposes (not commuting)
- Employees may opt to voluntarily use their own respirators when respirators are not required
  - “Mini-respiratory program” triggered, requiring training on respirators and user seal checks

# Respirators & PPE

1910.504(f)

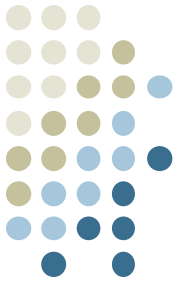


- Whenever employee is interacting with a suspected or COVID-19+ patient, must wear:
  - Respirator;
  - Gloves;
  - Isolation gowns or protective clothing; and
  - Eye protection.
    - Note: If you have a limited supply of respirators, employers may follow CDC strategies for optimizing supply of N95 Respirators



# Aerosol-Generating Procedures

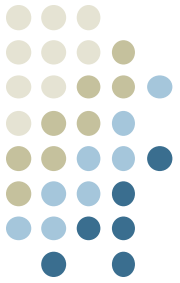
1910.502(g)



- Definition: Procedure that generates aerosols that can be infections and are of respirable size.
  - Includes: CPR, BiPAP, CPAP, manual ventilation, intubation, extubating, and some dental & postmortem procedures
- Limit the number of employees present
- Must be performed in an Aerosol Infection Isolation Room (AIIR), if available
- Must clean and disinfect the room after the procedure

# PPE Exceptions

1910.504(f)

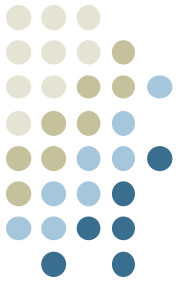


- Exceptions include when an employee:
  - Is alone in a room
  - Is eating/drinking and is six feet away or barriers are used
  - Deems it important to see a person's mouth (Ex: Deaf Patient)
  - Cannot due to medical necessity, condition, disability, or potential hazard that would cause serious injury or death

\*\*\*Exception: Well-Defined Area Exception still applies when all employees are vaccinated and non-employees are screened prior to entry to 1910.504(f),(h), and(i)

# Physical Distancing

1910.502(h)

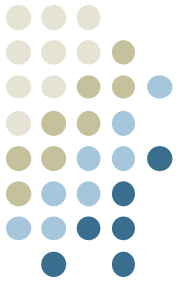


- Employees should be six feet apart when indoors
  - Does not apply in areas of movement (Ex: Hallways)
  - Visual cues such as signs and floor markings help
  - Limit the number of employees on a specific task, stagger work shifts, or create remote opportunities
- If not feasible, be as far apart as possible

\*\*\*Exception: Well-Defined Area Exception still applies when all employees are vaccinated and non-employees are screened prior to entry to 1910.504(f),(h), and(i)

# Physical Barriers

1910.502(i)



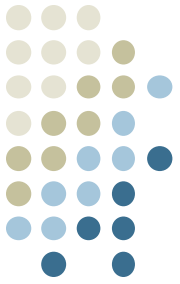
- Required outside of direct patient care areas when six feet of distance is not feasible (Ex: Lobby, Check-In, Bill Payment, etc.)
- All fixed work locations must have cleanable or disposable solid barriers blocking face pathways
- It is allowed to have a pass through space at the bottom

\*\*\*Exception: Well-Defined Area Exception still applies when all employees are vaccinated and non-employees are screened prior to entry to 1910.504(f),(h), and(i)



# Cleaning and Disinfection

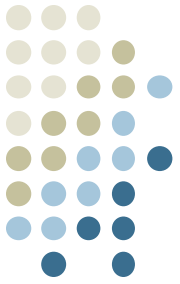
1910.502(j)



- Patient areas, resident rooms, and medical devices must be cleaned
  - Follow CDC Guidelines for Cleaning Agents
  - Hospital Grade Cleaning Products Only
- Cleaned once a day or when COVID-19+ present
- Employers must provide alcohol based hand rubs of 60% alcohol or higher

# Ventilation

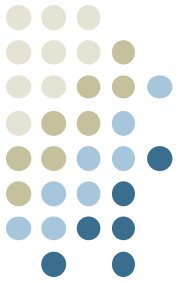
1910.502(k)



- Employer owned or controlled building with existing HVAC systems must:
  - Maximize outside air and air changes per hour
  - Use filters with MERV greater than 13
    - If not compatible, use highest filter grade
  - Replace filters as necessary
  - Maintain clearance of outside intakes
- Maintain your AIIR rooms

# Health Screening

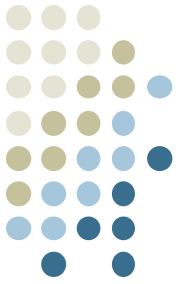
1910.502(l)(1)



- Screening Employees
  - Before each workday and each shift
  - Can require self-monitoring
  - Any required screening COVID-19 tests must come at no cost to employees
- Employees must notify Employers of COVID-19:
  1. Confirmed Positive Test or Diagnosis
  2. Suspected Diagnoses from Healthcare Provider
  3. Recent Loss of Taste/Smell
  4. Fever  $\geq 100.4$  and new unexplained cough with shortness of breath

# Employee Notification

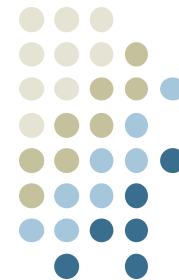
1910.502(l)(2)



- Employers must notify employees and third-party employers within 24 hours of when one of the previous four events occurs
  - Notification must include that there was exposure to someone who is COVID-19+, dates COVID-19+ person was in the workplace, and dates of close contact between COVID-19+ person and this person
- “Close contact”: contact within (i) six feet for (ii) fifteen or more minutes within a (iii) 24-Hour window and (iv) within the 2-day transmission period.



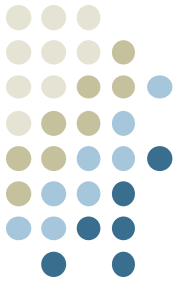
# Return to Work – Symptoms 1902.502(I)(4) & CDC Guidelines



- If employee was removed from work with:
  - Mild/Moderate Symptoms:
    - Return 10 days since symptoms first appeared;
    - 24 hours since last fever without fever reducing medication; and
    - Symptoms have improved.
  - Severe/Critical Symptoms:
    - The same, except employees with severe symptoms can still be infectious for up to 20 days from their first symptoms. Return to work 10 days or up to 20 days after first symptoms and meeting the above criteria.

# Return to Work – Testing

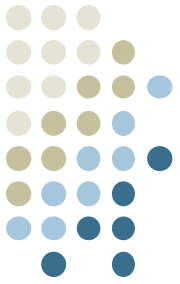
1902.502(I)(4) & CDC Guidelines



- If employee was removed from work and want them to get tested:
  - Symptomatic:
    - Resolution of fever without medication;
    - Improvement of symptoms; and
    - Two negative results collected more than 24 hours apart
  - Asymptomatic:
    - Two negative results collected more than 24 hours apart

## Return to Work – Close Contact

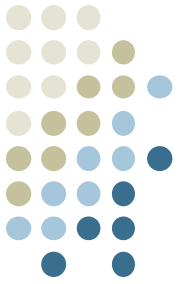
1902.502(I)(4) & CDC Guidelines



- If employee was in close contact with a COVID-19+ person:
  - Remove them for 14 days or until they have a negative PCR test that was taken at least 5 days from exposure
  - Can return to work if the test is negative and 7 days have passed since exposure
  - If employee is capable of working, working in isolation or remotely is an acceptable alternative
- Exception if: Employee is (1) asymptomatic and (2a) vaccinated or (2b) has recovered from COVID-19 in the last three months.

# Removal Benefits

1910.502(l)(5)



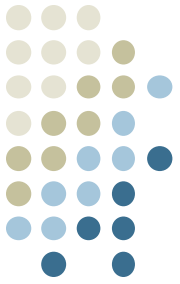
- Isolated or Remote Work: Regular Pay
- Removed from Work: Regular pay up to \$1,400/week until they return to work.
  - <500 Employees: Third week onward, pay is reduced to two-thirds regular pay up to \$1,000/week until they return to work.
- Removal pay required for COVID+ cases regardless of where employee contracted COVID
  - However, not required for employee close contacts outside of work
- Payment amount reduced by any compensation from another source, including sick and administrative leave
- No removal pay if employee refuses to take test to expedite return to work

\*Exception: If you have 10 or fewer employees



# Vaccination

1910.502(m)



- Must provide reasonable time and paid sick leave for vaccination appointment and side effect recovery
  - No minimum time
  - OSHA recommends:
    - 4 hours/shot (2 Doses)
    - 8 hours recovery/shot (2 Doses)
    - Total: 24 Hours of Leave

# Training

1910.502.(n)



- Employers must train on:
  - COVID-19 transmission, hygiene, spread prevention, signs/symptoms, risk factors for severe illness, and when to seek care
  - PPE procedures and policies
  - Cleaning and disinfection policies
  - Work tasks that could result in infection
  - Sick leave policies
  - Employer-specific policies on screening/management

# Training Cont.

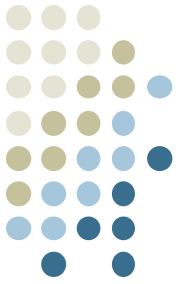
1910.502.(n)



- Employers must train on:
  - Identity of the safety coordinator
  - Details on how to obtain copies of ETS and COVID-19 Plan
  - Multi-employer workplace agreements if more than one employer in setting
- Employers must re-train when:
  - Changes occur that affect employee's risk of contraction;
  - Policies or procedures change; or
  - When there is a clear indication information was not retained by employee

# Anti-Retaliation

1910.502(o)

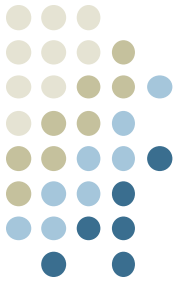


- Employers are prohibited from discharging or discriminating against employee for exercising their rights or for engaging in actions required by this section
- Employers must inform employees of their rights to not be discharged or discriminated against for exercising the rights under the ETS.



# Costs

1910.502(p)



“The implementation of all requirements of this section, with the exception of any employee self monitoring conducted under paragraph (l)(1)(i) of this section, must be at no cost to employees.”

- Cost includes time as well as money.

# Recordkeeping

1910.502(q)



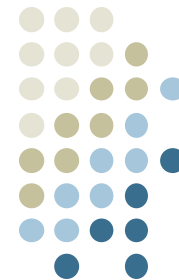
- Retain all versions of your COVID-19 Plan
- Maintain a COVID-19+ Log including:
  - last day at the workplace, date of positive test or diagnosis, and date employee first had symptoms
  - Cases go on the log regardless of where employee obtained COVID
  - Supposed to facilitate COVID case tracking
  - Still have to do a 300 Log too and determine “work-relatedness”

\*Exception: If you have 10 or fewer employees, this does not apply to you.



# Recordkeeping Cont.

1910.502(q)

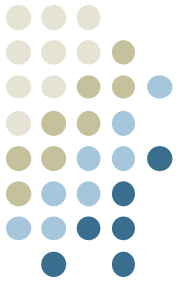


- Availability Requirements:
  - Change in COVID-19 Plan: Next Business Day
  - COVID-19+ Log:
    - Sick Employee or “Authorized Representative”: 24 Hours
    - Other Employee or “Authorized Representative”: 24 Hours, redacted name, contact information, and occupation

\*Exception: If you have 10 or fewer employees, this does not apply to you.

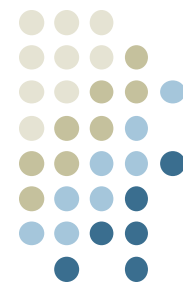
# OSHA Reporting

1910.502(r)

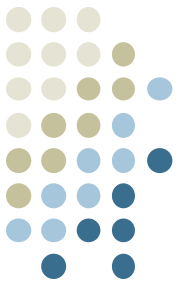


- Must Report:
  - Work-Related COVID-19 Fatality: 8 Hours regardless of how long after transmission the employee dies
  - Work-Related COVID-19 Inpatient Hospitalization: 24 Hours
  - Only need to report those COVID-related fatalities and inpatient hospitalizations that are work-related
    - Namely, those COVID cases contracted at work
    - Burden on the employer to make a “reasonable determination” as to whether case was contracted at work

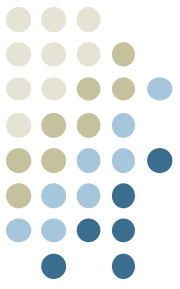
# ETS's FUTURE



- Anticipate a lot of litigation relating to the ETS
  - CalOSHA's ETS gives us some guidance....
  - Was it properly adopted?
  - Does OSHA have authority?
    - Especially relating to the “paid removal” provisions
  - Are we still in an emergency?
- The Standard is “temporary” so at some point, it to be withdrawn



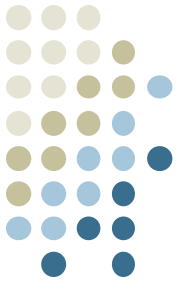
# STATUS OF OSHA ENFORCEMENT ACTIVITIES



# Current OSHA Activities

- OSHA was overwhelmed with calls and complaints regarding COVID but is getting back to normal
- Focusing on in-person inspections again
- Adopted a National Emphasis on COVID focusing largely on health care
- For COVID, OSHA generally allowing employers to “self-report” if no fatality
  - A lot of COVID fatality inspections
  - Why? Because employees passing away outside of work is now the employer’s problem.....

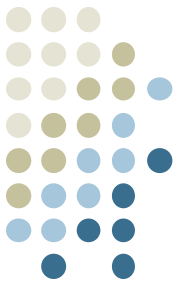
# OSHA Actions re. COVID



- If employer can prove followed CDC and OSHA guidance—and now the ETS, then no citations
- If cannot prove that, then citations and likely a press release, negative attention, and claims
- OSHA was previously issuing most citations under the General Duty Clause, which are a little bit easier to defeat



# COVID Retaliation Claims— Protected Activity

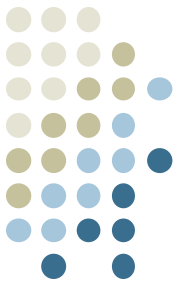


- Protected activity can include:
  - 1) Calling OSHA;
  - 2) Refusing to work due to safety/COVID concerns;
  - 3) Reporting alleged unsafe work environment to management;
  - 4) Complaining about alleged work related injury or illness; and/or
  - 5) Testifying in any internal or OSHA investigation
  - 6) Exercising work removal due to close contact or COVID-19+ under the ETS

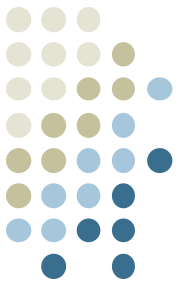


# Retaliation & COVID-19

## Considerations...

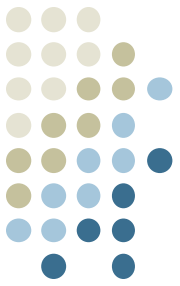


- Do NOT terminate due to raising COVID concerns/issues, rather focus on the employee's behavior/conduct
- Refusal to work solely due to FEAR (particularly unsubstantiated fear that is not rooted in any specific and real safety hazard) can be considered “job abandonment”



# TIPS FOR MANAGING AN OSHA INSPECTION

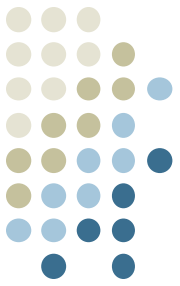
# Types of Violations and Penalties (New Fines)



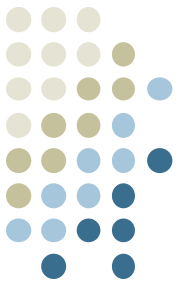
- Serious
  - Substantial probability of death or serious physical harm
  - Fines of up to **\$13,653** for each violation
- Willful
  - Intentional act in knowing violation of OSHA Act or employer is aware of the hazard and makes no effort to eliminate it
  - Fine between \$5,000 and **\$136,532** for each violation
- Repeat
  - Fines up to **\$136,532** for a substantially similar violation
- Failure to Abate
  - Failure to correct a prior violation
  - Fine up to **\$13,653** for each day violation continues beyond abatement date
- Other than Serious
  - Violation with direct relationship to job safety, but not likely to cause harm or death.
  - Discretionary fine of up to **\$13,653**



# Contacting OSHA (General Rule)



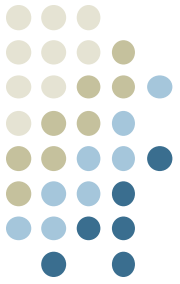
- Reporting requirements:
  - If a fatality occurs within 30 days of work-related incident, it must be reported to local OSHA office within 8 hours
  - Must also report any incident resulting in an amputation, loss of an eye or the hospitalization of an employee within 24 hours of the incident
  - Employers must report the incident within 24 hours of learning about the triggering event
    - Citations being issued for failure to do this
  - Resulting in more inspections than ever!



# The Inspection Process

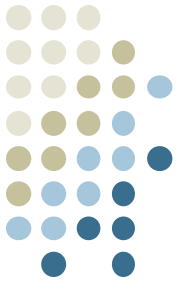
- Opening Conference
- The “Walk Around”
- Employee Interviews
- Document Requests
- Closing Conference
- Citations
- Informal Settlement Conference
- Contesting Citations

# The Opening Conference



- Conducted upon arrival by compliance officer
- Company representatives should absolutely attend
  - Do not allow the inspection to start until the appropriate people are onsite!
- Officer must give reason for inspection
  - Plain View, Accident, Complaint, Scheduled
  - If a Complaint, request a copy of it

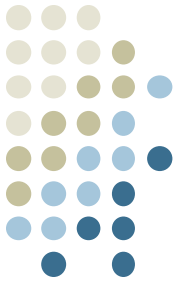
# Consent and the OSHA Inspection



- Consent:
  - Employer has a right to request a warrant
    - Not always advisable to do so, but should be raised as needed
    - Get appropriate personnel onsite
    - BUY SOME TIME!
  - Plain View Doctrine:
    - When worksite is visible from a public area, an OSHA officer has the right to photograph and observe from that location
  - Consent may be given by any management official
  - Make sure employees are aware of this
    - Implied consent will be inferred if not objected to

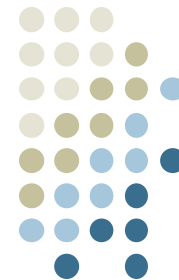


# The “Walk Around”



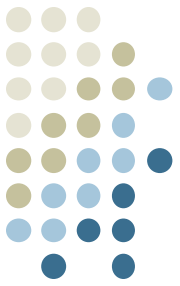
- NEVER allow an OSHA officer to walk the worksite unattended
- Company and union representatives have right to accompany the officer
- Limit the walk around to only relevant area(s)
- Take parallel videos, photos, samples and notes
  - Do not rely on or expect OSHA to share its evidence
  - You have a computer in your pocket—use it!

# Employee Interviews



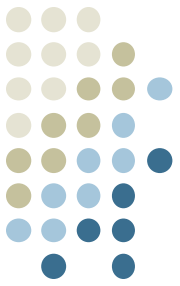
- Interviews are 100% VOLUNTARY
- Any “supervisory” employee may be interviewed
  - Any foreman, crew leader, lead man, or other employee considered “in charge”
  - Applies even if person is in a union
- Anyone may be present during all management interviews
- Union or hourly employee may be interviewed privately or with steward or whoever else they want there, including translator
- What is said can become evidence for purposes of issuing citations
- KNOW YOUR RIGHTS!
  - Have the right not to be recorded or sign statements
  - Read a statement before signing

# OSHA Document Requests

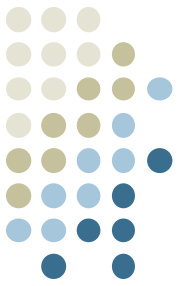


- Insist that requests be made to a single source and in writing
  - Makes for more efficient record keeping and prevents turnover of improper documents
- Considerations:
  - Is the document responsive to the request?
    - Do not give them something they have not asked for
  - Is the document relevant to the inspection?
    - If not, do not give it to them—can and should object!
- Always keep a copy
- Never allow unfettered access to documents

# Closing Conference

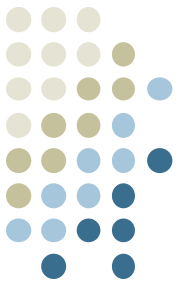


- Obtain as much information from Inspection Officer as possible:
  - What citations will be recommended?
  - How will each be classified?
  - What abatement should be done?
  - How should abatement be accomplished?
  - Basis for each citation?
- Clarify any misunderstandings of fact



# Issuance of Citations

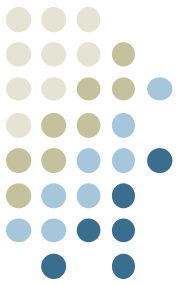
- Citations arrive by way of certified mail and are tracked by OSHA
- Citations must be received within 6 months of inspection or they are stale and can be easily defeated
- Citations will reference Standard(s) violated, set out proposed penalties, and outline your rights
- Act on Citations IMMEDIATELY



# How to Respond

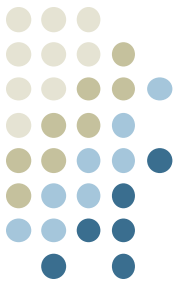
- Pay the Citation in Full (not advised)
- Informal Conference with the Area Director
- Notice of Contest
- Formal Settlement
- Hearing

# After the Citation



- Employer also has a right to an informal conference with an area OSHA director within the 15 day period
- Have 15 working days from receipt to file a notice of contest
  - Not extended under any circumstance
- Failure to file notice of contest precludes any challenge to any part of a citation

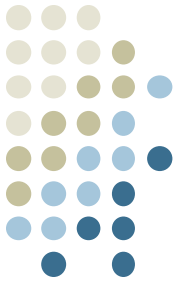
# Post-Citation Informal Conference



- OSHA encourages conference and it should be pursued
- A potential means for resolution without litigation or other appeal
- Allows employer to gain understanding of exactly what OSHA expects
- Can be “free” discovery and exchange of “evidence”
- Don’t beg—evaluate the citations, formulate a plan, and reach a settlement on the merits!

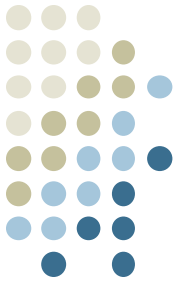


# To Contest...Or Not To Contest



- Varies depending on circumstances
- Consider:
  - Nature of violation
    - Repeat? Willful?
  - Proposed penalties
  - Impact on future business
  - Cost to contest
  - Cost of abatement
    - If prohibitively costly and delays completion of work, may want to challenge
  - Whether employer believes citation is proper or not.

# QUESTIONS?



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