

OSHA UPDATES FOR 2022 & TIPS FOR MANAGING AN INSPECTION

Presented By:
Matthew Horn
SmithAmundsen LLC

Visit Our COVID-19 Resource Center at
www.saLAWus.com



1

● 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



2

OSHA UPDATES FOR 2022 & BEYOND



3

The Current State of OSHA

- A much more aggressive OSHA:
 - More regulation, inspections, and citations
 - Increased fines and repeat and willful citations
- Already seeing this:
 - The Vaccination and Testing ETS (blocked)
 - Politically and headline-motivated citations (i.e. healthcare!)
 - More willful citations



4

OSHA's Blocked Vaccine ETS

- The Supreme Court blocked OSHA's Emergency COVID-19 Vaccination and Testing Standard
 - required employers with one hundred or more employees to require vaccinations OR conduct weekly testing of all unvaccinated employees
- Procedurally, the ruling stayed the ETS, but signaled the final outcome for the ETS, finding that OSHA went beyond its authority



5

OSHA's Blocked Vaccine ETS

- The Court stated: “[a]lthough Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly. Requiring the vaccination of 84 million Americans, selected simply because they work for employers with more than 100 employees, certainly falls in the latter category”



6

Federal Healthcare Employees

- Department of Health and Human Services also required all employees in most healthcare settings (hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies) to be vaccinated as a condition for federal funding
- Numerous states filed legal challenges and the Supreme Court found for the Federal Government
 - “[T]he Secretary [of Health and Human Services] did not exceed his statutory authority in requiring that, in order to remain eligible for Medicare and Medicaid dollars, the facilities covered by the interim rule must ensure that their employees be vaccinated against COVID-19.”



7

Federal Healthcare Employees

- All healthcare employees at facilities that receive federal funding must be fully vaccinated to comply with the Department of Health and Human Services
- By now, all healthcare employees should be fully vaccinated at federally funded facilities



8

State Healthcare Employees

- As mentioned previously, different states have adopted different standards
- Whereas any facilities accepting federal funding requires all facility employees be fully vaccinated, some states give the option for employees to be tested weekly instead



9

Expired Healthcare ETS

- Adopted in June 2021
- Expired six months later in December 2021
- OSHA then withdrew the ETS, except for reporting obligations
- OSHA now relying on the withdrawn ETS as “recommended guidance”
- OSHA working towards a permanent healthcare rule



10

Expired Healthcare ETS

- “OSHA will vigorously enforce the general duty clause and its general standards, including the Personal Protective Equipment (PPE) and Respiratory Protection Standards, to help protect healthcare employees from the hazard of COVID-19. The Respiratory Protection Standard applies to personnel providing care to persons who are suspected or confirmed to have COVID-19. OSHA will accept compliance with the terms of the Healthcare ETS as satisfying employers’ related obligations under the general duty clause, respiratory protection, and PPE standards. Continued adherence to the terms of the healthcare ETS is the simplest way for employers in healthcare settings to protect their employees.”



11

Current COVID “Guidance”

- OSHA *recommends* all healthcare facilities adopt a formal COVID-19 prevention plan, incorporating the following activities and elements:
 - Conducting a hazard assessment relating to COVID-19 exposure;
 - Providing PPE—respirators, gloves, glasses, and gowns—to employees who are “reasonably anticipated to be exposed to a person with suspected or confirmed COVID-19”
 - Adopting policies that encourage sick workers to stay home and not come into work;
 - Communicating and training employees on the policies and procedures implemented (in their native languages); and
 - Implementing protections from retaliation for workers who raise COVID-19 related concerns and issues.



12

Current COVID “Guidance”

- Policies for distancing
 - Stagger shifts, reduce capacity, etc.
- Implement engineering controls
 - Physical barriers—plexiglass, etc.
 - Proper ventilation and ventilation systems
 - Personal protective equipment
- Implement administrative controls
 - Face masks (if not distanced and unvaccinated and based on state and local guidance)
- Routine cleaning and sanitizing
 - Make wipes and cleaning supplies readily available



13

Current COVID Requirements

29 CFR 1910.502(q)(2)

- All healthcare employers must maintain a COVID-19 Log including:
 - Name, contact information, occupation, location where the employee worked, date of employee’s last day at the workplace, date of positive test or diagnosis, and date employee first had symptoms of COVID-19 if any were present.
 - Record must be made within 24 hours of learning about a COVID-19+ employee, regardless of where they were exposed to COVID-19
 - 10 or fewer employees exception no longer applies.



14

Current COVID Requirements

29 CFR 1910.502(q)(3)

- Records must be available by the end of the next business day
- A record must also be kept which redacts all confidential information and must be made available to all employees, personal representatives, and authorized representatives.



15

Return to Work & Quarantine for Healthcare Providers

- (A) After 7 days of quarantine with a negative test 48 hours prior to returning; (B) 10 days of quarantine if not testing; OR (C) 10 days of quarantine if you tested positive between days 5-7; and
- 24 hours have passed since last fever without fever reducing medications; and
- symptoms of coughing or shortness of breath have improved; OR
- Two negative antigen tests collected greater than 24 hours apart.



16

OSHA ENFORCEMENT



17

Current OSHA Activities

- OSHA overwhelmed with calls and complaints regarding COVID but is getting back to normal
- Focusing on non-COVID, in-person inspections again
- 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!
 - Also.....



18

Nat'l Emphasis Program

- OSHA launched a national emphasis program focusing enforcement efforts on industries and employers most impacted by COVID-19
- Put primary emphasis on inspecting workplaces where there have been COVID-19 related fatalities, serious illnesses, outbreaks, and employee complaints

Nat'l Emphasis Program

- Secondly, the program requires OSHA to compile a list of employers to inspect based on industry and employer 300A data
 - Includes employers in healthcare, meat processing, food handling and processing, warehousing and storage, agriculture, construction, and manufacturing with elevated illness rates according to the employer's individual 300A data

Nat'l Emphasis Program

- In addition to 300A Annual Summary data, OSHA is proposing a new rule which would additionally require establishments with 100 or more employees to annually submit Form 300 Log and Form 301 Incident Report Information
 - OSHA believes this addition information will help them make targeted, more specific standards
- Good news: OSHA only has six month after a violation to issue citations.....

COVID-19 Focused Inspections in Healthcare

- “The intent of this initiative is to magnify OSHA’s presence in high-hazard healthcare facilities over a three-month period (March 9, 2022 to June 9, 2022).”
 - Follow-up inspection of any prior inspection where a COVID-19-related citation or hazard alert letter (HAL) was issued;
 - Follow-up or monitoring inspections for randomly selected closed COVID-19 unprogrammed activity (UPA), to include COVID-19 complaints and Rapid Response Investigations (RRIs); or
 - Monitoring inspections for randomly selected, remote-only COVID-19 inspections where COVID-19-related citations were previously issued.

OSHA Actions re. COVID

- If employer can prove followed CDC and OSHA guidance, then no citations
- If cannot prove that, then citations and likely a press release, negative attention, and claims
- Since OSHA *currently* has no COVID Standards, usually issue citations under general duty clause, but also, recording/reporting, PPE, respiratory protection, etc.

Most Common Healthcare Citations

- **PPE & Respiratory Protection**
 - **Not providing proper PPE**
 - **No respiratory protection program**
 - **Not doing fit testing**
 - **Not doing medical evaluations**
- Musculoskeletal/patient handling
- Bloodborne pathogen
- Workplace violence

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



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



27

Types of Violations and Penalties (New Fines)



- Serious
 - Substantial probability of death or serious physical harm
 - Fines of up to **\$14,502** 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 **\$142,502** for each violation
- Repeat
 - Fines up to **\$142,502** for a substantially similar violation
- Failure to Abate
 - Failure to correct a prior violation
 - Fine up to **\$14,502** 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 **\$14,502**
- Recent budget bill in House of Representatives sought to increase fines 5x!



Contacting OSHA ("New" 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!



29

The Inspection Process



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



30

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 including a foreman or superintendent
 - Make sure employees are aware of this
 - Implied consent will be inferred if not objected to
 - On a multiple-employer site, consent comes from site “controller”
 - Usually owner, developer, or general contractor

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, shift leader, lead person, 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
- DO NOT: 1) make admissions; 2) argue; 3) get angry; 4) insult the officer or OSHA; 5) discuss politics; or 6) discuss the financial situation of your company

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

Preparing for the Informal

- Greatest obstacle to settlement is an unrealistic view and position by one or both parties
 - Clients often have so much uncertainty as to validity of citations
- To eliminate uncertainty, evaluate and analyze the citations to identify the merits
- Prepare comprehensive memorandum evaluating each citation and defenses to those citations
- Formulate an aggressive settlement position that accounts for the merits and the client's best interest

Typical Defenses

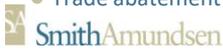
- Conduct does not violate Standard
- Lack of knowledge by employer
- No employee exposure
- Employee misconduct defense
- Infeasibility/impossibility
- Compliance presents a "greater hazard"
- Duplicative citations
- Citation not properly classified

Informal Conference

- OSHA encourages conference and it should be pursued
 - Make a good impression for future inspections
- A potential means for resolution without litigation
- Allows employer to gain understanding of OSHA's evidence and expectations
- Can be "free" discovery and exchange of "evidence"
- Level the playing field
 - Don't beg or argue irrelevant issues!
 - Evaluate the citations, discuss the evidence and law, and reach a settlement on the merits!

Settlement Techniques

- Demonstrate valid defenses justifying dismissal
 - Letters of Interpretation, Case Law, Etc.
- Group related citations
- Reduce classifications of citations
 - “Repeat”—not substantially similar to past citation
 - “Willful”—no heightened awareness
- Accept citations under other Standards with less future exposure
- Trade abatement for classifications, fines, etc.



43

To Contest...Or Not To Contest

- Varies depending on circumstances
- Consider:
 - Nature of violation
 - Repeat? Willful?
 - Potential exposure going forward
 - Proposed penalties
 - Impact on future business
 - Disclose on prequalification forms?
 - Cost of abatement
 - If prohibitively costly, may want to challenge
 - Bad press or employee relations
 - Cost to contest



44

Contest Process

- When in doubt, CONTEST—contest ~50% of cases
- First 60-90 days = discuss settlement
- Then small scale litigation (usually 12-15 months)
 - Complaint
 - Answer
 - Written Discovery
 - Oral Discovery/Depositions
 - Dispositive Motions
 - Trial
- Can settle at any stage—OSHA’s offer rarely gets worse and usually gets better!



45

QUESTIONS?

Matthew Horn

Partner

OSHA Practice Group

312.894.3322

mhorn@salawus.com

OSHA Website: www.oshalegal.com

*Chicago, Crystal Lake, St. Charles, Rockford, Indianapolis, Milwaukee, St. Louis
USLawNetwork Member: (North America, Europe, S. America & Asia)*



46