

Passing of the Torch: What to Expect from OSHA in a Biden Administration

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Another four years and we come to a new White House administration. We predict OSHA's priorities in a Biden administration based on campaign talking points, the Democratic House's actions in the past two years, and experience from the Obama administration.

COVID-19 Emergency Temporary Standard

Employers can expect OSHA under Biden to direct resources to issuing a COVID-19 Emergency Temporary Standard (ETS). Most OSHA jurisdictions do not have a specific COVID-19 standard. However, some states have promulgated COVID-19 specific standards. State-plan OSHA agencies in California, Michigan, Oregon, and Virginia have each adopted COVID-19 standards that are likely to provide a good indication of what requirements a federal OSHA ETS might include:



- developing and implementing a preparedness and response plan;
- social distancing;
- screening;
- practicing proper hygiene and other infection control measures;
- assessing exposure risks;
- masking;
- notifying public health departments about positive employee tests;
- testing in the wake of an outbreak;
- recordkeeping; and
- training.

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States that have implemented a COVID-19 ETS have mandated that employers provide training, signage, and other types of employee communications in languages common to employee populations, and OSHA could follow suit. Biden appointed a COVID advisory commission on November 9, and a Biden administration OSHA will likely hit the ground running on January 20, 2021 working toward an ETS.

Aggressive Use of Citations and Enforcement

We expect OSHA to push for more egregious cases (i.e., instance-by-instance willful citations resulting in \$500,000 or more in penalties), with support from DOL's Solicitor's Office in coordinating and pursuing these matters. Even with an enhanced focus on allegedly egregious, high-dollar cases, we anticipate a Biden administration to expand the term "bad actor." OSHA might be better served following data to pursue the most problematic employers, but the agency can sometimes lose focus in labeling all employers "bad." Aligned with this more aggressive enforcement approach, we expect to see:

- more inspections, more citations, more willful and repeat citations;
- increased use of the multi-employer citation doctrine;
- skepticism about employer safety incentive programs; and
- reduced use of cooperative programs and partnerships with employers (like OSHA's Voluntary Protection Programs).

We anticipate expanded efforts to encourage whistleblowers to report perceived violations through a streamlined process, supplemented with increased resources. OSHA enforces more than 20 federal whistleblower laws, so its reach in this area goes beyond just the OSH Act.

A Biden administration may also look to wrest federal control from the states that have been active in areas where federal OSHA either has not shown interest or has not gained traction. We expect that OSHA will continue to turn to the General Duty Clause as its enforcement catchall while these more specific standards wind their way through the rulemaking process. We expect aggressive enforcement in the areas of heat illness and infectious disease, for instance.

Recordkeeping and Public Shaming

More stringent recordkeeping requirements and increased use of employer records in enforcement are likely under a Biden OSHA. "Publicity as deterrence" is something Dr. Michaels, the head of OSHA under Obama, talked about often, and the Trump administration's efforts to limit publication of violations will likely disappear. Biden's OSHA may reverse course, publicizing citations to shame employers into compliance. Beyond recordkeeping and an ETS, implementation of workplace violence and heat illness standards could be among the Biden administration's initial regulatory priorities.

Filling Leadership Roles

President Trump governed for his entire administration without a political head of OSHA (Assistant Secretary of Labor), as the Senate never voted on the nomination. Assuming President Biden is able to get an Assistant Secretary nominee confirmed by the Senate, the mere appointment of politically confirmed leadership in OSHA's Assistant Secretary role will differ from the Trump administration. OSHA's current Principal Deputy, Loren Sweatt, has been at the controls for years, but given her acting role, she has been circumscribed in implementing her agency vision. OSHA's Director of Enforcement role has also been filled on an acting basis for an extended period. Finding permanent personnel to execute these roles will likely provide more political heft behind OSHA's policy-making decisions. Appointing someone aligned with former Assistant Secretary Dr. David Michaels - like Dr. Michaels' former deputy Jordan Barab - could drastically change OSHA's enforcement approach. Unions will certainly have more and bigger seats at the table in a Biden OSHA, and with them Union priorities may be increasingly incorporated into OSHA policy.

Budget Dependent?

The OSHA budget has been flat for the past three years. It is yet to be seen whether OSHA's budget will be increased. However, it is clear that many significant policy and enforcement decisions will be affected by the budget allotted to OSHA.