



Expect These 8 Changes To OSHA Under The Biden Administration

Insights

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Media outlets announced Saturday that Joe Biden will become the 46th president of the United States. If the legal challenges to the election result fail and he is inaugurated in January, President-Elect Biden can begin taking actions that will immediately impact employers. You should begin preparing now for managing a workforce under the Biden administration, which has pledged to make significant changes to the American workplace, including an expansion of worker's rights.

Given the ongoing COVID-19 pandemic, the president-elect has already indicated that the planned changes include several designed to improve workplace safety, a key focus of the upcoming Biden administration. Although it is not easy to predict exactly what actions Biden will take once he gains control of the executive branch, employers may see the following changes to the Occupational Safety and Health Administration (OSHA), the agency charged with protecting America's workforce, over the next four years.

1. Create An Emergency Temporary Standard For COVID-19.

Biden has urged President Trump to "immediately release and enforce an Emergency Temporary Standard to give employers and frontline employees specific, enforceable guidance on what to do to reduce the spread of COVID." Despite this pressure, the Trump administration has stated that it will not be enacting a COVID-19 standard.

However, Biden likely will work with unions and other worker advocacy groups to develop a COVID-19 standard if the pandemic continues to impact worker safety in early 2021, especially if no vaccine is immediately available. Employers should begin taking actions now to ensure their safety policies and procedures are compliant with CDC guidance, including these often-misunderstood guidelines.

2. Double The Number Of OSHA Inspectors.

During his campaign, Biden called on President Trump to drastically increase OSHA's enforcement of regulations and guidelines concerning COVID-19. Specifically, he called for the current President to "double the number of OSHA investigators to enforce the law and existing standards and guidelines." Given this aggressive approach to workplace safety enforcement, Biden likely will increase the number of investigators in OSHA and the Mine Safety Health and Administration.

There are roughly 761 OSHA inspectors working right now, compared to about 1,000 or so who were in place a decade ago. If the Biden administration begins hiring additional investigators immediately

in place a decade ago. If the Biden administration begins hiring additional investigators immediately, it likely will take around 18 months for the new inspectors to be trained and begin conducting inspections. Once those new compliance officers are in the field, employers can expect more OSHA inspectors knocking on their door.

3. Appoint A Head Of OSHA And Restore Advisory Committees.

Biden has already indicated that he will ensure all appointments to political and permanent positions within the safety agency will be filled. The Trump administration never had a permanent head of OSHA, after nominee Scott Mugno withdrew his name from consideration in 2019.

Expect Biden to immediately fill the Assistant Secretary of Labor position assigned to OSHA, likely with a safety professional with close ties to organized labor. Biden will also ensure that OSHA's advisory committees and boards are fully staffed and meet regularly. This includes committees on construction safety and health, maritime safety, and general industry safety.

4. Restore The Original Electronic Reporting Rule.

Under a rule originally adopted under Obama-Biden administration in 2017, OSHA began requiring certain employers (including those with more than 250 employees at a single location) to, among other things, report employee injury and illness information to OSHA. The safety agency planned to post this information online for public viewing on its website. However, this rule was largely abandoned when Trump took office.

Biden may look to resurrect the original version of the rule, which was never repealed by Trump, and force certain employers to report detailed employee injury and illness information (including the information found on OSHA 300 Logs) to OSHA. Absent a successful legal challenge, the agency would then make the information available to the public by posting it online.

5. Increase General Duty Clause Citations For COVID-19 Violations of CDC Guidelines.

Under the Occupational Safety and Health Act and most state OSHA plans, employers must furnish "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." This is known as OSHA's General Duty Clause (GDC). OSHA can cite employers for violation of the GDC if a recognized serious hazard exists in their workplace and the employer does not take reasonable steps to prevent or abate the hazard. The GDC is used only where there is no OSHA standard that applies to the particular hazard, like the COVID-19 pandemic. The elements of a violation of the GDC are:

- the employer failed to keep the workplace free of a hazard to which employees of that employer were exposed;
- the hazard was recognized;
- the hazard was causing or was likely to cause death or serious physical harm; and
- there was a feasible and useful method to correct the hazard.

During the H1N1 pandemic, the Obama-Biden administration tasked OSHA and the Centers for Disease Control and Prevention (CDC) with issuing detailed guidance for how employers should protect their workers. OSHA then enforced the CDC guidelines using the GDC as an enforcement tool.

Eugene Scalia, the current Secretary of Labor, has already indicated that noncompliance with OSHA's and the CDC's guidance to date "supports an enforcement action under the general duty clause." Yet, the number of GDC citations issued by OSHA during the pandemic has been limited. Look for OSHA under a Biden administration to immediately begin issuing more GDC citations if employers violate CDC guidelines for health and safety concerns related to the ongoing pandemic.

6. Finalize A Permanent Infectious Disease Standard.

After the H1N1 pandemic, the Obama-Biden administration spent years preparing a new, permanent infectious disease standard, which would have required health facilities and certain other high exposure workplaces to permanently implement infection control programs to protect their workers.

Given the significant impact of the COVID-19 pandemic on the American workforce, look for the Biden administration to resurrect the proposed infectious disease standard and push for its adoption, even if the COVID-19 pandemic ends early in his tenure. An employee safety-focused administration will argue that the permanent standard is needed in case any future pandemic strikes the United States.

7. Foster Greater Cooperation With And Stricter Oversight Of State OSHA Plans.

Federal OSHA and the 22 state OSHA plans haven't always seen eye-to-eye, and that notion has been exaggerated over the last 4 years. State OSHA plans, like North Carolina and South Carolina, have refused to adopt federal OSHA's increased maximum penalties, originally adopted under the Obama-Biden administration. Meanwhile other state plans like Virginia, Michigan, and Oregon have adopted their own Emergency Temporary Standard for COVID-19, despite the Trump administration's refusal to do so.

Under a Biden administration, expect federal OSHA to work more closely with the state OSHA plans and seek more aggressive enforcement from their state counterparts. This could lead to additional pressure to increase the state plans' penalties, enforce the 2016 federal OSHA anti-retaliation rule, and require employers to post electronically their OSHA 300 data.

8. Enforce The 2016 OSHA Anti-Retaliation Rule.

In 2016, OSHA published a final rule that, among other things, amended federal law to add a provision prohibiting employers from retaliating against employees for reporting work-related injuries or illnesses. See 29 C.F.R. § 1904.35(b)(1)(iv). In the preamble to the final rule and post-promulgation interpretive documents, OSHA discussed how the final rule could apply to action taken under workplace safety incentive programs, injury and accident reporting programs, and post-incident drug testing policies. The 2016 rule indicated, among other things, that blanket automatic

incidents drug testing policies. The 2018 rule indicated, among other things, that blanket automatic post-accident drug testing is improper because it has been shown to discourage employees from properly reporting injuries.

The Trump administration has largely not enforced the rule. Although Trump did not reverse the rule, OSHA clarified its position in October 2018, providing that “action taken under a safety incentive program or post-incident drug testing policy would only violate 29 C.F.R. § 1904.35(b)(1)(iv) if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health.”

Despite the 2018 clarification, the original version of Obama-Biden rule is still in effect. A Biden administration likely will begin enforcing the rule beginning in January 2021. Thus, employers may want to carefully reconsider any blanket post-accident drug testing policies and drug test rather when “employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use,” thereby taking on a more reasonable suspicion-based standard.

Conclusion

Workplace safety enforcement will be more aggressive and robust under an OSHA governed by a Biden administration. Employers should take actions now to ensure that their safety and health programs are compliant with rules that, although not enforced during the Trump presidency, are still in place and govern American workplaces.

You should continue to provide safe workplaces for your employees and invest resources into identifying and eliminating workplace safety hazards at your worksite, in anticipation of greater enforcement efforts from OSHA during the next four years.

Fisher Phillips will continue to monitor these developments expected over the next four years and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our [Workplace Safety and Catastrophe Management Practice Group](#).

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