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## What Employers Need to Know Today About OSHA's 2023 Priorities and Enforcement Trends

### Introduction

The COVID-19 pandemic launched the Occupational Safety and Health Administration (OSHA) into the national spotlight. The agency is using its platform to roll out increased enforcement backed by the threat of enhanced citations and penalties. Employers should consider whether they are in OSHA's crosshairs and should take proactive measures to avoid enforcement actions. Employers in California should also take note that Cal/OSHA has adopted a "permanent" COVID-19 standard, which replaces the previous emergency standards.

#### ISSUE #1 OSHA's National Emphasis Program on Heat-Related Hazards

**WHAT YOU NEED TO KNOW – THE BOTTOM LINE:** In April 2022, the U.S. Department of Labor announced a national emphasis program (NEP) targeted at indoor and outdoor heat-related hazards. The Heat NEP went into effect on April 8, 2022, and is scheduled to expire on April 8, 2025.

**WHY YOU NEED TO KNOW – INFORMATION AND ANALYSIS:** NEPs are temporary programs that focus OSHA's attention and resources on specific hazards and high-hazard industries.

The Heat NEP is targeted at identifying and eliminating or reducing worker exposures to occupational heat-related hazards both indoors and outdoors in (1) general industry, (2) construction, (3) maritime and (4) agriculture. These specific industries are expected to have the highest exposure to heat-related hazards that result in illness and death. For reference, the U.S. Department of Labor's Bureau of Labor Statistics reported that between 2015 and 2019, environmental heat cases resulted in an average of 35 fatalities per year and an average of 2,700 cases with days away from work.

The Heat NEP was issued in response to directives from the White House, including President Joe Biden's Executive Order 14008, "Tackling the Climate Crisis at Home and Abroad," which established a goal of reducing heat-related illnesses. State plans are strongly encouraged (but are not required) to adopt the Heat NEP. Currently, the following states have provided a notice of intent to adopt the Heat NEP: California, Connecticut, Hawaii, Maryland, Maine, Michigan, New Jersey, New Mexico, Nevada, New York, Oregon, Puerto Rico, South Carolina, Virginia, Virgin Islands, Vermont, and Washington.

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The Heat NEP identifies a multipronged approach to reduce heat-related hazards, including inspection targeting and outreach and compliance assistance.

*Inspections.* The Heat NEP establishes enhanced inspection protocols, including a focus on planned and follow-up inspections in targeted workplaces and a preference for on-site inspections. Each OSHA region is expected to increase its heat inspections by 100% above the average year's number of heat inspections between 2017 and 2021.

Compliance safety and health officers (CSHOs) are receiving guidance and directives on how to increase the number of heat-related inspections they perform. For instance, CSHOs investigating for other purposes are directed to open or refer a heat-related inspection for hazardous heat conditions observed, recorded in OSHA 300 logs or 301 incident reports or where an employee reports a heat-related hazard to the CSHO. Additionally, if the day's heat index is expected to be 80°F or higher during an inspection, the CSHO has been instructed to ask about an employer's heat-related hazard prevention program. CSHOs are expected to perform programmed inspections on any days that the National Weather Service has announced a heat warning or advisory for the local area.

To further increase OSHA's heat-related inspections, the U.S. Department of Labor Wage and Hour Division is partnering with OSHA and will refer heat-related hazards to OSHA for inspection.

*Outreach and Compliance Assistance.* Each area office is expected to conduct outreach programs concerning heat illness, including guidance concerning the Heat NEP. For example, the area offices are expected to share information on the Heat NEP and available compliance tools and resources, including no-cost on-site consultation services for small businesses. Area offices are also encouraged to collaborate with other offices and agencies to reduce heat illness.

**NOW THAT YOU KNOW – KEY TAKEAWAY(S):** Heat-related illness is at the forefront of OSHA's enforcement priorities. All employers, particularly those in industries identified as high-hazard by OSHA, are under increased scrutiny and should review their heat illness prevention programs for compliance and efficacy.

## ISSUE #2 Cal/OSHA's COVID-19 Prevention Non-Emergency Regulations

**WHAT YOU NEED TO KNOW – THE BOTTOM LINE:** Cal/OSHA's COVID-19 Prevention Emergency Temporary Standards are no longer in effect. Instead, Cal/OSHA will be enforcing its COVID-19 Prevention Non-Emergency Regulations from February 3, 2023, through February 3, 2025.

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**WHY YOU NEED TO KNOW – INFORMATION AND ANALYSIS:** California state agencies, like Cal/OSHA, may adopt emergency regulations to avoid serious harm to the public. The emergency rulemaking process is simplified to expedite and facilitate the necessary emergency regulations. Unless the emergency regulations are formally readopted, the regulations only remain in effect for 180 days.

In November 2020, the Cal/OSHA Standards Board approved the first iteration of the COVID-19 Prevention Emergency Temporary Standards (ETS). As the COVID-19 pandemic continued to evolve, the standards board amended and extended the ETS three times.

In response to calls for a “permanent” COVID-19 Prevention Standard, the board initiated the formal rulemaking process to create the COVID-19 Prevention Non-Emergency Regulations. The board voted to adopt the Non-Emergency Regulations at their meeting on December 15, 2022. The regulations took effect on February 3, 2023, and will remain in effect until February 3, 2025. The recordkeeping requirements in these regulations will remain in effect until February 3, 2026.

Notable changes from the most recent version of the ETS include the following:

- Employers are no longer required to report outbreaks to the local health department. However, employers must report major outbreaks of COVID-19 to Cal/OSHA.
- Employers are no longer required to provide exclusion pay to employees who are required to stay away from work due to work-related COVID-19 exposure.
- The definition of an “exposed group” still contains a “momentary pass-through” exception. This exception has been broadened to include individuals who are not masked. As redefined, the momentary pass-through exception applies to a place where persons momentarily pass through without congregating, provided that it is not a work location, working area or a common area at work.
- A COVID-19 outbreak can be deemed over when “one or fewer” new cases are detected in the exposed group for a 14-day period. Previously, an outbreak was only over when there were no new cases within this timeframe.
- The definition of “close contact” is aligned with California Department of Public Health’s definition as follows:
  - For indoor airspaces of 400,000 or fewer cubic feet, “close contact” means sharing the same indoor space with a COVID-19 case for a cumulative total of 15 minutes over a 24-hour period during the COVID-19 case’s infectious period.
  - For indoor airspaces greater than 400,000 cubic feet, “close contact” means being within six feet of a COVID-19 case for a cumulative total of

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15 minutes or more over a 24-hour period during the COVID-19 case's infectious period.

- Note: Offices, suites, rooms, waiting areas, break or eating areas, bathrooms or other spaces separated by floor-to-ceiling walls are considered distinct indoor airspaces.

**NOW THAT YOU KNOW – KEY TAKEAWAY(S):** Employers subject to the COVID-19 Prevention Non-Emergency Regulations should review and update their existing COVID-19 prevention programs and procedures. For assistance bringing your program up-to-date, please work with the Jackson Lewis attorney with whom you often work or any member of our Workplace Safety and Health Team.

## ISSUE #3 OSHA Enforcement Trends

**WHAT YOU NEED TO KNOW – THE BOTTOM LINE:** Starting March 27, 2023, OSHA will substantially increase (1) the number of citations issued for violations and (2) the accompanying penalties in a purported effort to reduce health and safety violations.

**WHY YOU NEED TO KNOW – INFORMATION AND ANALYSIS:** On January 26, 2023, OSHA announced two enforcement guidance changes that went into effect on March 27, 2023. These changes are expected to result in an increased number of citations and accompanying penalties.

*Grouping Violations.* During an inspection, OSHA has the discretion to group violations into a single citation. The guidance recommends grouping violations into a single citation when:

- Two or more serious or other-than-serious violations constitute a single hazardous condition that is overall classified by the most serious item;
- Two or more other-than-serious violations considered together create a substantial probability of death or serious physical harm; or
- Two or more other-than-serious violations result in a high-gravity other-than-serious violation.

If grouping multiple violations into a single citation will not elevate the gravity or classification and resulting penalty, regional administrators and area managers are being directed to cite violations individually. This is expected to increase the number of

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citations issued following an inspection. Given that penalties are attached with each citation, this is also expected to be accompanied by a jump in penalties.

Grouping violations may be considered when encouraged by an existing directive. However, this new guidance gives regional administrators and area directors discretion to issue individual citations if the violations have different abatement methods, each violative condition may result in death or serious physical harm or if each violative condition exposes workers to a related but different hazard.

*Instance-By-Instance Citations.* Presently, OSHA allows for instance-by-instance (IBI) citations for willful violations. Beginning March 27, 2023, regional administrators and area managers have more discretion to cite specific OSHA violations as IBI citations, which will multiply the penalties issued.

The OSHA violations subject to this new guidance include specific “high-gravity” serious violations and violations where the language of the rule supports a citation for “each instance” of noncompliance, including hazards related to falls, trenching, machine guarding, respiratory protection, permit-required confined spaces, lockout tagout and other-than-serious violations specific to recordkeeping. Industries covered by this new guidance include general industry, agriculture, maritime and construction.

In deciding whether to issue IBI citations in these covered circumstances, regional administrators and area managers should base their decision on at least one of the following factors:

- The employer has received a willful, repeat or “failure to abate” violation within the past five years where that classification is current;
- The employer has failed to report a fatality, inpatient hospitalization, amputation or loss of an eye pursuant to the requirements of 29 CFR 1904.39;
- The proposed citations are related to a fatality or catastrophe; or
- The proposed recordkeeping citations are related to injury or illness(es) that occurred as a result of a serious hazard.

**NOW THAT YOU KNOW – KEY TAKEAWAY(S):** OSHA’s new field guidance and emphasis on increased citations and penalties will result in: (1) a greater number of serious citations; (2) inflated penalties; and (3) a higher risk of being placed on OSHA’s severe violator list (and additional scrutiny from the agency going forward).

Employers are encouraged to continue taking proactive steps to ensure workplace health and safety compliance. Given the agency’s new agenda, employers are also encouraged to partner with our Workplace Health and Safety Team during inspections to help mitigate adverse outcomes and to defend against inflated citations and penalties.