

2023 Mid-Year Report: OSHA Update

July 24, 2023

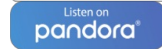
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Transcript

Alitia Faccione:

No matter the month or year, employers can count on one thing, changes in workplace law. Having reached the midway point of the year, 2023 does not look to be an exception. What follows is one of a collection of concise programs, as We Get Work™ the podcast provides the accompanying voice of the Jackson Lewis 2023 Mid-Year Report. Bringing you up-to-date legislative, regulatory, and litigation insights that have shaped the year thus far and will continue to do so. We invite you and others at your organization to experience the report in full on JacksonLewis.com, or listen to the podcast series on whichever streaming platform you turn to for compelling content. Thank you for joining us.

Courtney Malveaux:

Hello everyone and welcome to the Jackson Lewis midyear report on OSHA, the Occupational Safety and Health Administration. What is OSHA up to? Now that we're halfway through 2023, this is a great time to check in where OSHA is, what its initiatives are. My name's Courtney Malveaux and I am here with my co-leader of the workplace safety and health practice group at Jackson Lewis, Melanie Paul, and she is a experienced and former solicitor within the Department of Labor and she used to prosecute OSHA citations and now she's on the other side of these and she is defending employers who get them. And so, we'll hear from her in a minute.

And, I... Again, Courtney Malveaux. I also used to be with OSHA. I used to be a labor commissioner and so I used to sign the citations and now I defend employers that get them. And so, we're going to talk about a few things just to give you a few quick oversight of what we will talk about. First is heat illness, OSHA's initiative on fall protection, what's happening with personal protective equipment. We're going to talk

about enforcement initiatives and finally COVID's not completely done, at least as far as OSHA is concerned. So, just to give you a quick overview of some things that we're focused on.

And so, we've been to a couple of conferences with all of the leadership of OSHA and they keep hitting on one mantra, the vulnerable worker. We kept hearing about their emphasis on protecting the vulnerable worker and so everything they're doing is really geared toward trying to attack on that and so for example, with heat now, OSHA is pushing guidance and a proposed rule that is more complicated than the water, rest, shade mantra that we've been following for years. Now, OSHA's put out detailed guidance and it's putting out a rule that... Will put out a rule that will give much more detailed specifics in terms of what OSHA's expectations are for indoor and outdoor employers for employees who exert themselves in the heat. And so, and OSHA does require written plans and training for supervisors and for employees, and so those are some things that OSHA is requiring on heat.

Then, on fall protection, there's a national emphasis program on that and there's also a proposed rulemaking on personal protective equipment, PPE, for female workers, and that is focused on the construction industry because as OSHA says, employees come in all shapes and sizes and so the PPE needs to fit and protect them no matter who you are.

Other things. OSHA has really dug in on its enforcement agenda. So, there are a number of things that OSHA's doing internally with these citations to really pack more punch in them. OSHA is now looking to cite not just for multiple instances of a hazard but every single instance of a hazard to multiply the number of items you're cited for. OSHA is giving authority to area directors to group less. In other words, similar hazards or similar infractions aren't grouped together as one monetary penalty but can be broken up into several. There's the severe violator enforcement program, the list of employers that get extra attention from the agency. It's a lot easier to get in and a lot easier to get out. And, then finally, penalty increases.

And, then I mentioned COVID. Yes, by and large, we're past a lot of that, but as far as OSHA's concerned, the healthcare industry is not and so OSHA did say we're coming out with a permanent standard to deal with COVID in healthcare.

Melanie, tell me. What do you think about that and what's your prediction?

Melanie Paul:

Well, Courtney, OSHA recently updated its spring regulatory agenda and actually updated the drop date for that final rule for COVID healthcare employers in June of this year. Well, June has come and gone and still no final rule. But, interestingly, OSHA also updated its proposed rulemaking target date for a permanent infectious disease standard for March of 2024 and in the description of that proposed rule, they have now included COVID-19. So, it may very well be that the agency punts on issuing a final rule for COVID for healthcare specifically and just kind of combine that into a broader infectious disease rule that covers other types of diseases like MRSA, tuberculosis, SARS, Ebola, things like that.

So, that's kind of what's on the horizon and I'm predicting that OSHA's not going to

issue a final rule for COVID-19 for healthcare. We're kind of long past the urgency on that and I think it's primed to be part of a broader infectious disease standard. And, I would also point out that with the spring regulatory agenda update, a number of their rulemaking has been pushed back. Deadlines for when things were expected to come out have been pushed back and there are a number of rules that were anticipated in June that of course have not been issued. And, also some new proposed rules on the horizon, which also had a June drop date and that was missed.

But, it's a very interesting rule I want to talk about today that all employers really need to know about and that is OSHA plans to do a notice of proposed rulemaking on the worker walk-around representative designation process. That's a lot of words but that's the title of the notice of proposed rulemaking. And, broken down, what that really means is when OSHA does an on-site inspection, part of that due process that an employer has is there is a walk-around and during that walk-around, under the Occupational Safety and Health Act, it actually allows for employees to have a representative for them during that walk-around. The origin of this proposed rule is that during the Obama administration in 2013, the agency issued a letter of interpretation where they basically said anybody could represent employees of that employer during a walk-around, including union representatives, when maybe that that site didn't even have a collective bargaining agreement. Maybe that employer didn't have a union at all. And, OSHA was permitting union representatives to come into a work site, to an employer, to represent employees during that walk-around whether or not that union even had a presence at that employer.

And so, obviously that got a lot of pushback from the regulated community and in 2017, the Trump administration rescinded that letter of interpretation, and those letters of interpretation represent agency policy, so the Trump administration in 2017 rescinded it. But, as we've seen with the Biden administration, they are trying to resurrect many of the policies that we saw during the Obama years and so now instead of doing a letter of interpretation, they are trying to do it the right way under the administrative procedures act and actually do rulemaking where they can have the regulated community weigh in with comments on that.

But, it's a really interesting issue because as we're seeing an uptick of unionization in this country, this is going to be a very meaningful rule.

Courtney Malveaux:

So, that sounds a little concerning, I think, for a number of employers that think it would be a little problematic. So, if you have a place of employment in which there's no union presence whatsoever and [inaudible 00:09:18] don't have a collective bargaining agreement, and let's just say the employees don't want one, it sounds like then OSHA could open an inspection and someone can show up from a union you may not have heard of. It may be a person you've never seen in your life saying that they represent employees. Is that what we're talking about here?

Melanie Paul:

Absolutely, because earlier policy in 2013 sort of gave compliance officers discretion to allow whomever to be a, quote, employee representative, unquote. So, it is very concerning, particularly for employers who are trying actively to not have unions

infiltrate their workplace and for employers that are currently battling that situation where they're undergoing union votes and the like, the union, which is not yet a union at that work site and for that employer, can actually become a representative during that OSHA walk-around, during that inspection. So, it is a very big concern that employers across all industries in this country should be aware of.

Courtney Malveaux:

Well, thanks for that. You know what? So, I think you know what is top of mind for me. Record-keeping.

Melanie Paul:

Oh. Your favorite topic.

Courtney Malveaux:

So. It is. Who could not get excited over record-keeping? So, you've heard me say this before. It's [inaudible 00:10:41] issue. It's one that it's not really popping on top of the radar for everybody and I get it. You know? If you keep records, you usually have one person with a green shade off in a corner doing your OSHA records and you don't have to be bothered with it. But, OSHA's really using the records and the logs that we have to put together for most workplaces.

And so, there was a rule two administrations ago in which OSHA said, okay, we're going to take all of your OSHA 300 logs, that list of all the injuries and illnesses in your workplace. We're going to take that 300 A summary of all of your injuries and illnesses, a number of people who experienced them and days away, et cetera. And, we're going to take those 301 incident reports, the specific information about each and every incident. And, we're going to take all of those and we used to keep those maybe in a binder or off in a computer or something like that and then if you're asked for it, you provide it and that's it.

Not anymore. So, then OSHA had said, well, we're going to make you actually put those, send those electronically to OSHA and even said that they are going to post information online about your place of work. Now, the difficult part for many of the employers... There are two real difficulties there. One is that an employee may not want his or her personal information, their name, their injury, their incident, everything else, posted. And, they're only a few exceptions to the rule in what are called privacy cases when an employee can say, "I don't want my name on there. I don't want my name out there that I experienced this to the world." And, there are many cases like that.

But, that's only a few instances, a few exceptions, and generally you have to provide all that information. And so, OSHA would make that available generally and broadly. And so, the other problem for a lot of employers was, well, hey, wait a minute. I mean, yes, there are times when an injury or illness may be because there was a hazard that we could have prevented. That is true. That happens from time to time. It is also true that there are times when someone may have had an injury or an illness that was work-related but not necessarily arise from a hazard that we could have done something about under the standards, and maybe a standard doesn't apply.

And, yet, that information is put out there for the public to see. The unions, the news media, industry competitors, you name it. And so, that information under that rule would be put out there. So, that'll [inaudible 00:13:11].

Melanie Paul:

Well, Courtney, if I could just interject. That rule was supposed to drop I think much earlier this year. But, again, it's one of those that keeps getting pushed back and pushed back. I mean, I think this administration has a very aggressive and ambitious enforcement agenda and rulemaking agenda in that regard. But, they have hands in too many pots and they can't seem to complete anything and certainly not within the timeframes that they estimate. So, this is another rule that their spring unified agenda, they had just said they were going to drop this final rule in June. Well, again, June has come and gone and there's no record-keeping rule.

I do think we are going to see it this year, though.

Melanie Paul:

And, employers should be concerned because as you said, now all of these things, the 300s, the 300 A's, and the 301 incident reports, for certain employers are going to be required to have to electronically submit them to OSHA. And, interestingly, the title of this rulemaking is Improved Tracking Of Workplace Injuries and Illnesses. And, this just rings of big brother. Right? So, the government wants more intel and more insight into private employers, businesses, and they should be concerned with what is the government going to do with this information. If employers fail to submit these records timely, that could get them an OSHA inspection and citations. If they submit the records but they're inconsistent with other records that they have on site during an OSHA inspection, that too could garner citations.

And so, there are many nefarious ways, if you will, that the government can use these records against the employer, even though it's under the auspices of improved tracking of workplace injuries and illnesses. And, part of that may be true to gather statistics for the Bureau of Labor and Statistics on these issues. But, again, the agency is an enforcement agency and that means that anything you provide to OSHA and anything you say to OSHA can and will be used against you.

Courtney Malveaux:

And, there's a lot of nuance in what you have to record and what you have to report. And so, we are advising employers on what the nuances of the rules are so that you're being honest, you're recording accurately, and you're recording what you need to record and not what you don't.

And, one last thing about that is that this net is going to capture more workplaces. So, the prior rule was if you had 250 or more employees, then you had to do the electronic submissions. Now, this new rule says if you have 100 or more employees at a work site, you must submit. So, this is going to catch a lot more employers with smaller work sites and it's really going to multiply. It's going to catch a lot of people by surprise.

So, that's what's on my mind. And, Melanie, would you like to wrap it up for us?

Melanie Paul:

Yeah, absolutely. And, in breaking news, OSHA just announced a new national emphasis program for warehousing and distribution centers. More to come on that in a future podcast, so be sure to tune in. Thanks for joining us on this JL midyear update podcast on what in the world is OSHA doing these days and if you have any questions or concerns about any of the topics that we've covered today, please feel free to reach out to Courtney or myself or any member of the Jackson Lewis workplace safety and health practice group. Thanks so much.

Alitia Faccone:

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