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Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19

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SUMMARY

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Occupational Safety and Health Administration (OSHA): Emergency Temporary Standards (ETS) and COVID-19

The Occupational Safety and Health Administration (OSHA) does not currently have a specific standard that protects health care or other workers from airborne or aerosol transmission of disease or diseases transmitted by airborne droplets. Some in Congress, and some groups representing health care, meat and poultry processing, and other workers, are calling on OSHA to promulgate an emergency temporary standard (ETS) to protect workers from exposure to SARS-CoV-2, the virus that causes Coronavirus Disease 2019 (COVID-19). The Occupational Safety and Health Act of 1970 (OSH Act) gives OSHA the ability to promulgate an ETS that would remain in effect for up to six months without going through the normal review and comment process of rulemaking. OSHA, however, has rarely used this authority in the past—not since the courts struck down its ETS on asbestos in 1983.

The California Division of Occupational Safety and Health (Cal/OSHA), which operates California's state occupational safety and health plan, has had an aerosol transmissible disease (ATD) standard since 2009. This standard includes, among other provisions, the requirement that employers provide covered employees with respirators, rather than surgical masks, when these workers interact with ATDs, such as known or suspected COVID-19 cases. In addition, according to the Cal/OSHA ATD standard, certain procedures require the use of powered air purifying respirators (PAPR). Cal/OSHA has also promulgated an ETS to specifically address COVID-19 exposure in the workplace. The agency that operates the state occupational safety health plan in Michigan (MIOSHA) has promulgated an ETS to specifically address COVID-19 in workplaces. In January 2021, the Virginia state plan (VOSH) promulgated a permanent standard to supersede its ETS, and in May 2021, the Oregon state plan (Oregon OSHA) replaced its ETS with a permanent standard.

Provisions in various COVID-19 relief bills in the 116th Congress (H.R. 925, H.R. 6139, H.R. 6201, H.R. 6379, H.R. 6559, H.R. 6800, S. 3475, S. 3584, and S. 3677) would have required OSHA to promulgate an ETS to address COVID-19 exposure in the workplace. The OSHA ETS provisions were not included in the COVID-19 relief legislation enacted into law (P.L. 116-127 and P.L. 116-260). There has been no legislation in the 117th Congress to require OSHA to promulgate a COVID-19 ETS.

On January 21, 2021, President Joe Biden issued an executive order directing OSHA to review whether a COVID-19 ETS is necessary and, if necessary, issue an ETS by March 15, 2021. To date, OSHA has not issued a COVID-19 ETS.

As of January 14, 2021, OSHA had issued citations from 315 inspections related to COVID-19 resulting in a total of $4,034,288 in proposed civil penalties. These citations have been issued for violations of the OSH Act's General Duty Clause and other existing OSHA standards, such as those for respiratory protection that may apply to COVID-19. Senators Elizabeth Warren and Cory Booker have raised concerns about the low amount of penalties being assessed for COVID-19-related violations.

Pursuant to guidance issued by OSHA on May 22, 2021, employers are not required to record or report any injuries or illnesses caused by the COVID-19 vaccine. This guidance supersedes earlier OSHA guidance that had required employers to record and report adverse reactions to the vaccine if vaccination was a condition of employment.

Contents

Occupational Safety and Health Administration Standards 1
State Plans 1
Promulgation of OSHA Standards 1
Notice and Comment 2
OSHA Rulemaking Time Line 3
Judicial Review 4
Emergency Temporary Standards 4
ETS Requirements 4
ETS Duration 5
OSHA Standards Related to COVID-19 7
Current OSHA Standards 7
OSHA Respiratory Protection Standard 8
National Institute for Occupational Safety and Health Certification 8
Medical Evaluation and Fit Testing 9
Temporary OSHA Enforcement Guidance on the Respiratory Protection Standard 9
OSHA Infectious Disease Standard Rulemaking 10
Executive Order Requiring Updated OSHA Guidance and Consideration of an ETS 11
State Occupational Safety and Health Standards 11
California: Cal/OSHA Aerosol Transmissible Disease Standard 11
Cal/OSHA Aerosol Transmissible Disease PPE Requirements 12
Cal/OSHA COVID-19 ETS 13
Michigan: MIOSHA COVID-19 Emergency Rules 13
Oregon: Oregon OSHA COVID-19 Permanent Administrative Rules 13
Virginia: VOSH COVID-19 Permanent Standard 14
Congressional Activity in the 116th Congress to Require an OSHA Emergency Temporary Standard on COVID-19 15
H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020 16
P.L. 116-127, the Families First Coronavirus Response Act 16
H.R. 6379, the Take Responsibility for Workers and Families Act 17
H.R. 6559, the COVID-19 Every Worker Protection Act of 2020 18
COVID-19 Recordkeeping 18
Whistleblower Protections 20
H.R. 6800, The Heroes Act 21
H.R. 925, The Heroes Act (Revised) 21
P.L. 116-260, Consolidated Appropriations Act, 2021 21
Congressional Activity in the 117th Congress 22

Tables

Table 1. OSHA Rulemaking Process: Estimated Durations of Activities 3

Table A-1. OSHA Emergency Temporary Standards (ETS) 23
Table A-2. State Occupational Safety and Health Standards That Apply to COVID-19 24

Appendixes

Appendix. 23

Contacts

Author Information 25

Occupational Safety and Health Administration Standards

Section 6 of the Occupational Safety and Health Act of 1970 (OSH Act) grants the Occupational Safety and Health Administration (OSHA) of the Department of Labor the authority to promulgate, modify, or revoke occupational safety and health standards that apply to private sector employers, the United States Postal Service, and the federal government as an employer.[1] In addition, Section 5(a)(1) of the OSH Act, commonly referred to as the General Duty Clause, requires that all employers under OSHA's jurisdiction provide workplaces free of "recognized hazards that are causing or are likely to cause death or serious physical harm" to their employees.[2] OSHA has the authority to enforce employer compliance with its standards and with the General Duty Clause through the issuance of abatement orders, citations, and civil monetary penalties. The OSH Act does not cover state or local government agencies or units. Thus, certain entities that may be affected by Coronavirus Disease 2019 (COVID-19), such as state and local government hospitals, local fire departments and emergency medical services, state prisons and county jails, and public schools, are not covered by the OSH Act or subject to OSHA regulation or enforcement.

State Plans

Section 18 of the OSH Act authorizes states to establish their own occupational safety and health plans and preempt standards established and enforced by OSHA.[3] OSHA must approve state plans if they are "at least as effective" as OSHA's standards and enforcement.[4] If a state adopts a state plan, it must also cover state and local government entities, such as public schools, not covered by OSHA. Currently, 21 states and Puerto Rico have state plans that cover all employers, and 5 states and the U.S. Virgin Islands have state plans that cover only state and local government employers not covered by the OSH Act.[5] In the remaining states, state and local government employers are not covered by OSHA standards or enforcement. State plans may incorporate OSHA standards by reference, or states may adopt their own standards that are at least as effective as OSHA's standards. State plans do not have jurisdiction over federal agencies and generally do not cover maritime workers and private sector workers at military bases or other federal facilities.

Promulgation of OSHA Standards

OSHA may promulgate occupational safety and health standards on its own initiative or in response to petitions submitted to the agency by various government agencies, the public, or employer and employee groups.[6] OSHA is not required, however, to respond to a petition for a

[1] 29 U.S.C. §655. The provisions of the Occupational Safety and Health Act of 1970 (OSH Act) are extended to the legislative branch as an employer by the Congressional Accountability Act (P.L. 104-1).

[2] 29 U.S.C. §654(a)(1).

[3] 29 U.S.C. §667.

[4] For additional information on Occupational Safety and Health Administration (OSHA) state plans, see CRS Report R43969, *OSHA State Plans: In Brief, with Examples from California and Arizona*.

[5] Information on specific state plans is available from the OSHA website at https://www.osha.gov/stateplans.

[6] Per Section 6(b)(1) of the OSH Act [29 §655(b)(1)], a petition may be submitted by " an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing

standard or to promulgate a standard in response to a petition. OSHA may also consult with one of the two statutory standing advisory committees—the National Advisory Committee on Occupational Safety and Health (NACOSH) or the Advisory Committee on Construction Safety and Health (ACCSH)—or an ad-hoc advisory committee for assistance in developing a standard.[7]

Notice and Comment

OSHA's rulemaking process for the promulgation of standards is largely governed by the provisions of the Administrative Procedure Act (APA) and Section 6(b) of the OSH Act.[8] Under the APA informal rulemaking process, federal agencies, including OSHA, are required to provide notice of proposed rules through the publication of a Notice of Proposed Rulemaking in the *Federal Register* and provide the public a period of time to comment on the proposed rules.

Section 7(b) of the OSH Act mirrors the APA in that it requires notice and comment in the rulemaking process.[9] After publishing a proposed standard, the public must be given a period of at least 30 days to provide comments. In addition, any person may submit written objections to the proposed standard and may request a public hearing on the standard.

Statement of Reasons

Section 6(e) of the OSH Act requires OSHA to publish in the *Federal Register* a statement of the reasons the agency is taking action whenever it promulgates a standard, conducts other rulemaking, or takes certain additional actions, including issuing an order, compromising on a penalty amount, or settling an issued penalty.[10]

Other Relevant Laws and Executive Order 12866

In addition to the APA and OSH Act, other federal laws that generally apply to OSHA rulemaking include the Paperwork Reduction Act,[11] Regulatory Flexibility Act,[12] Congressional Review Act,[13] Information Quality Act,[14] and Small Business Regulatory Enforcement Fairness Act (SBREFA).[15] Also, Executive Order 12866, issued by President Clinton in 1993, requires

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organization, the Secretary of Health and Human Services (HHS), the National Institute for Occupational Safety and Health, or a state or political subdivision."

[7] The National Advisory Committee on Occupational Safety and Health (NACOSH) was established by Section 7(a) of the OSH Act [29 U.S.C. §656(a)]. The Advisory Committee on Construction Safety and Health (ACCSH) was established by Section 107 of the Contract Work Hours and Safety Act (P.L. 87-581). Section 7(b) of the OSH Act provides OSHA the authority to establish additional advisory committees.

[8] The Administrative Procedure Act (APA) is codified at 5 U.S.C. §§500-596. For detailed information on federal agency rulemaking and the APA, see CRS Report RL32240, *The Federal Rulemaking Process: An Overview*.

[9] 29 U.S.C. §655(b).

[10] 29 U.S.C §655(e).

[11] 44 U.S.C. §§3501-3520.

[12] 5 U.S.C. §§601-612.

[13] 5 U.S.C. §§801-808.

[14] 44 U.S.C. §3516 note.

[15] 5 U.S.C. §601 note. For information on these additional laws that apply to OSHA rulemaking, see U.S. Government Accountability Office (GAO), *Workplace Safety and Health: Multiple Challenges Lengthen OSHA's Standard Setting*, GAO-12-330, April 2012, Appendix II, at https://www.gao.gov/products/GAO-12-330 (hereinafter cited as GAO-12-330, *Workplace Safety and Health*).

agencies to submit certain regulatory actions to the Office of Management and Budget (OMB) and Office of Information and Regulatory Affairs (OIRA) for review before promulgation.[16]

OSHA Rulemaking Time Line

OSHA rulemaking for new standards has historically been a relatively time-consuming process. In 2012, at the request of Congress, the Government Accountability Office (GAO) reviewed 59 significant OSHA standards promulgated between 1981 (after the enactments of the Paperwork Reduction Act and Regulatory Flexibility Act) and 2010.[17] For these standards, OSHA's average time between beginning formal consideration of the standard—either through publishing a Request for Information or Advance Notice of Proposed Rulemaking in the *Federal Register* or placing the rulemaking on its semiannual regulatory agenda—and promulgation of the standard was 93 months (7 years, 9 months). Once the Notice of Proposed Rulemaking was published for these 59 standards, the average time until promulgation of the standard was 39 months (3 years, 3 months).

In 2012, OSHA's Directorate of Standards and Guidance published a flowchart of the OSHA rulemaking process on the agency's website.[18] This flowchart includes estimated duration ranges for a variety of rulemaking actions, beginning with pre-rule activities—such as developing the idea for the standard and meeting with stakeholders—and ending with promulgation of the standard. The flowchart also includes an estimated duration range for post-promulgation activities, such as judicial review. The estimated time from the start of preliminary rulemaking to the promulgation of a standard ranges from 52 months (4 years, 4 months) to 138 months (11 years, 6 months). After a Notice of Proposed Rulemaking is published in the *Federal Register*, the estimated length of time until the standard is promulgated ranges from 26 months (2 years, 2 months) to 63 months (5 years, 3 months). **Table 1** provides OSHA's estimated time lines for six major pre-rulemaking and rulemaking activities leading to the promulgation of a standard.

Table 1. OSHA Rulemaking Process: Estimated Durations of Activities

Stage	Activities	Estimated Duration
1	Preliminary rulemaking activities	12-36 months
2	Developing the proposed rule	12-36 months
3	Publishing the Notice of Proposed Rulemaking (NPRM)	2-3 months
4	Developing and analyzing the rulemaking record, including public comments and hearings	6-24 months
5	Developing the final rule, including Office of Information and Regulatory Affairs (OIRA) submission	18-36 months
6	Publishing the final rule (promulgating the new standard)	2-3 months
Total estimated duration		52-138 months
Estimated duration from NPRM to final rule		26-63 months

Source: Congressional Research Service (CRS) with data from Occupational Safety and Health Administration (OSHA), Directorate of Standards and Guidance, *The OSHA Rulemaking Process*, October 15, 2012, at https://www.osha.gov/OSHA_FlowChart.pdf.

[16] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, October 4, 1993.

[17] GAO-12-330, *Workplace Safety and Health*.

[18] OSHA, Directorate of Standards and Guidance, *The OSHA Rulemaking Process*, October 15, 2012, at https://www.osha.gov/OSHA_FlowChart.pdf.

Judicial Review

Both the APA and the OSH Act provide for judicial review of OSHA standards. Section 7(f) of the OSH Act provides that any person who is "adversely affected" by a standard may file, within 60 days of its promulgation, a petition challenging the standard with the U.S. Court of Appeals for the circuit in which the person lives or maintains his or her principal place of business.[19] A petition for judicial review does not automatically stay the implementation or enforcement of the standard. However, the court may order such a stay. OSHA estimates that post-promulgation activities, including judicial review, can take between four and 12 months after the standard is promulgated.[20]

Emergency Temporary Standards

Section 6(c) of the OSH Act provides the authority for OSHA to issue an Emergency Temporary Standard (ETS) without having to go through the normal rulemaking process. OSHA may promulgate an ETS without supplying any notice or opportunity for public comment or public hearings. An ETS is immediately effective upon publication in the *Federal Register*. Upon promulgation of an ETS, OSHA is required to begin the full rulemaking process for a permanent standard with the ETS serving as the proposed standard for this rulemaking. An ETS is valid until superseded by a permanent standard, which OSHA must promulgate within six months of publishing the ETS in the *Federal Register*.[21] An ETS must include a statement of reasons for the action in the same manner as required for a permanent standard. State plans are required to adopt or adhere to an ETS, although the OSH Act is not clear on how quickly a state plan must come into compliance with an ETS.

ETS Requirements

Section 6(c)(1) of the OSH Act requires that both of the following determinations be made in order for OSHA to promulgate an ETS:

- that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and
- that such emergency standard is necessary to protect employees from such danger.

Grave Danger Determination

The term *grave danger*, used in the first mandatory determination for an ETS, is not defined in statute or regulation. The legislative history demonstrates the intent of Congress that the ETS process "not be utilized to circumvent the regular standard-setting process," but the history is unclear as to how Congress intended the term grave danger to be defined.[22]

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[19] 29 U.S.C. §655(f).

[20] OSHA, Directorate of Standards and Guidance, *The OSHA Rulemaking Process*, October 15, 2012, at https://www.osha.gov/OSHA_FlowChart.pdf.

[21] 29 U.S.C §655(c)(2).

[22] U.S. Congress, Senate Labor and Public Welfare, Subcommittee on Labor, *Legislative History of the Occupational Safety and Health Act of 1970 (S. 2193, P.L. 91-596)*, committee print, prepared by Subcommittee on Labor, 91st Cong., 1 sess., June 1971, 52-531 (Washington: GPO, 1971), p. 1218.

In addition, although the federal courts have ruled on challenges to previous ETS promulgations, the courts have provided no clear guidance as to what constitutes a grave danger. In 1984, the U.S. Court of Appeals for the Fifth Circuit in *Asbestos Info. Ass'n v. OSHA* issued a stay and invalidated OSHA's November 1983 ETS lowering the permissible exposure limit for asbestos in the workplace.[23] In its decision, the court stated that "gravity of danger is a policy decision committed to OSHA, not to the courts."[24] The court, however, ultimately rejected the ETS, in part on the grounds that OSHA did not provide sufficient support for its claim that 80 workers would ultimately die because of exposures to asbestos during the six-month life of the ETS.

Necessity Determination

In addition to addressing a grave danger to employees, an ETS must also be *necessary* to protect employees from that danger. In *Asbestos Info. Ass'n*, the court invalidated the asbestos ETS for the additional reason that OSHA had not demonstrated the necessity of the ETS. The court cited, among other factors, the duplication between the respirator requirements of the ETS and OSHA's existing standards requiring respirator use. The court dismissed OSHA's argument that the ETS was necessary because the agency felt that the existing respiratory standards were "unenforceable absent actual monitoring to show that ambient asbestos particles are so far above the permissible limit that respirators are necessary to bring employees' exposure within the PEL of 2.0 f/cc."[25] The court determined that "fear of a successful judicial challenge to enforcement of OSHA's permanent standard regarding respirator use hardly justifies resort to the most dramatic weapon in OSHA's enforcement arsenal."[26]

Although OSHA has not promulgated an ETS since the 1983 asbestos standard, it has since determined the necessity of an ETS. In 2006, the agency considered a petition from the United Food and Commercial Workers (UFCW) and International Brotherhood of Teamsters (IBT) for an ETS on diacetyl, a compound then commonly used as an artificial butter flavoring in microwave popcorn and a flavoring in other food and beverage products. The UFCW and IBT petitioned OSHA for the ETS after the National Institute for Occupational Safety and Health (NIOSH) and other researchers found that airborne exposure to diacetyl was linked to the lung disease *bronchiolitis obliterans*, now commonly referred to as "popcorn lung."[27] According to GAO's 2012 report on OSHA's standard-setting processes, OSHA informed GAO that although the agency may have been able to issue an ETS based on the grave danger posed by diacetyl, the actions taken by the food and beverage industries, including reducing or removing diacetyl from products, made it less likely that the necessity requirement could be met.[28]

ETS Duration

Section 6(c)(2) of the OSH Act provides that an ETS is effective until superseded by a permanent standard promulgated pursuant to the normal rulemaking provisions of the OSH Act. Section 6(c)(3) of the OSH Act requires OSHA to promulgate a permanent standard within six months of

[23] 727 F.2d at 415, 425-427 (5th Cir. 1984).

[24] 727 F.2d at 427 (5th Cir. 1984).

[25] 727 F.2d at 427 (5th Cir. 1984). The ETS mandated a permissible exposure limit (PEL) for asbestos of two asbestos fibers per cubic centimeter of air (2.0 f/cc).

[26] 727 F.2d at 427 (5th Cir. 1984).

[27] See, for example, Centers for Disease Control and Prevention (CDC): National Institute for Occupational Safety and Health (NIOSH), *NIOSH Alert: Preventing Lung Disease in Workers who Use or Make Flavorings*, DHHS (NIOSH) publication no. 2004–110, December 2003, at https://www.cdc.gov/niosh/docs/2004-110/.

[28] GAO-12-330, *Workplace Safety and Health*.

promulgating the ETS. As shown earlier in this report, six months is well outside of historical and currently expected time frames for developing and promulgating a standard under the notice and comment provisions of the APA and OSH Act, as well as under other relevant federal laws and executive orders. This dichotomy between the statutory mandate to promulgate a standard and the time lines that, based on historical precedent, other provisions in the OSH Act might realistically require for such promulgation raises the question of whether or not OSHA could extend an ETS's duration without going through the normal rulemaking process. The statute and legislative history do not clearly address this question.

OSHA has used its ETS authority sparingly in its history and not since the asbestos ETS promulgated in 1983. As shown in **Table A-1**, in the nine times OSHA has issued an ETS, the courts have fully vacated or stayed the ETS in four cases and partially vacated the ETS in one case.[29] Of the five cases that were not challenged or that were fully or partially upheld by the courts, OSHA issued a permanent standard either within the six months required by the statute or within several months of the six-month period and always within one year of the promulgation of the ETS.[30] Each of these cases, however, occurred before 1980, after which a combination of additional federal laws and court decisions added additional procedural requirements to the OSHA rulemaking process. OSHA did not attempt to extend the ETS's expiration date in any of these cases.

Although the courts have not ruled directly on an attempt by OSHA to solely extend the life of an ETS, in 1974, the U.S. Court Appeals for the Fifth Circuit held in *Florida Peach Growers Ass'n v. United States Department of Labor* that OSHA was within its authority to amend an ETS without going through the normal rulemaking process.[31] The court stated that "it is inconceivable that Congress, having granted the Secretary the authority to react quickly in fast-breaking emergency situations, intended to limit his ability to react to developments subsequent to his initial response."[32] The court also recognized the difficulty OSHA may have in promulgating a standard within six months due to the notice and comment requirements of the OSH Act, stating that in the case of OSHA seeking to amend an ETS to expand its focus, "adherence to subsection (b) procedures would not be in the best interest of employees, whom the Act is designed to protect. Such lengthy procedures could all too easily consume all of the temporary standard's six months life."[33]

[29] Mark A. Rothstein, "Substantive and Procedural Obstacles to OSHA Rulemaking: Reproductive Hazards as an Example," *Boston College Environmental Affairs Law Review*, vol. 12, no. 4 (August 1985), p. 673.

[30] For example, OSHA promulgated the Acrylonitrile (vinyl cyanide) ETS on January 17, 1978, and the permanent standard on October 3, 1978, with an effective date of November 2, 1978. The preamble to the permanent standard published in the *Federal Register* does not include information on the status of the ETS during the time between its expiration and the promulgation of the permanent standard. OSHA, "Occupational Exposure to Acrylonitrile (Vinyl Cyanide)," 43 *Federal Register* 45762, October 3, 1978.

[31] 489 F.2d. 120 (5th Cir. 1974).

[32] 489 F.2d. at 127 (5th Cir. 1974).

[33] 489 F.2d. at 127 (5th Cir. 1974).

OSHA Standards Related to COVID-19

Current OSHA Standards

Currently, no OSHA standard directly covers exposure to airborne or aerosol diseases in the workplace. As a result, OSHA is limited in its ability to enforce protections for health care and other workers who may be exposed to SARS-CoV-2, the virus that causes COVID-19.[34]

OSHA may enforce the General Duty Clause in the absence of a standard, if it can be determined that an employer has failed to provide a worksite free of "recognized hazards" that are "causing or are likely to cause death or serious physical harm" to workers.[35] In addition, OSHA's standards for the use of personal protective equipment (PPE) may apply in cases in which workers require eye, face, hand, or respiratory protection against COVID-19 exposure.[36]

As of January 14, 2021, OSHA had issued citations following 315 inspections related to COVID-19, resulting in a total of $4,034,288 in proposed civil penalties.[37] The majority of these citations were issued to health care, nursing, and long-term care providers, including three Department of Veterans Affairs facilities—hospitals in Indianapolis, IN, and Lyons, NJ, and a community living center in Queens, NY.[38] Citations were issued for violations of OSHA's respiratory protection, injury and illness reporting, and recordkeeping standards. Two employers in the meat processing industry—Smithfield Packaged Foods in Sioux Falls, SD, and JBS Foods locations in Greeley, CO, and Green Bay, WI—were cited for General Duty Clause violations. These were the only General Duty Clause citations issued by OSHA for activities related to COVID-19.

In a letter to OSHA, Senators Elizabeth Warren and Cory Booker raised concerns over the amount of penalties issued to Smithfield Packaged Foods and the Greeley, Colorado location of JBS Foods.[39] The Senators asked OSHA why these employers were each cited for single serious violations of the General Duty Clause rather than multiple violations for each area of the facilities in which social distancing measures were not implemented. They also asked why OSHA did not issue penalties for willful or repeated violations that carry maximum penalties of $134,937 per violation rather than the maximum penalty of $13,494 for serious or other than serious violations.[40] None of the employers cited for COVID-19-related violations were issued penalties for willful or repeated violations.

[34] OSHA has a standard on blood-borne pathogens (29 C.F.R. §1910.1030) but does not have a standard on pathogens transmitted by airborne droplets.

[35] 29 U.S.C. §654(a)(1).

[36] 29 C.F.R. §§1910.133, 1910.134, and 1910.138.

[37] OSHA, *Inspections with COVID-Related Citations*, as of January 14, 2021, https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations. In some cases, multiple citations were issued to the same employer.

[38] OSHA has the authority to issue citations to executive branch agencies but does not have the authority to issue civil monetary penalties to these agencies.

[39] Letter from Senators Elizabeth Warren and Cory Booker to Loren Sweatt, Principal Deputy Assistant Secretary of Labor, Occupational Safety and Health Administration, September 22, 2020, https://www.warren.senate.gov/imo/media/doc/Letter%20from%20Senators%20Warren,%20Booker%20to%20OSHA%209-22-20.pdf.

[40] OSHA citations are classified as "serious," "other than serious," "willful," or "repeated." The maximum amounts of OSHA penalties are subject to annual inflationary adjustments.

OSHA Respiratory Protection Standard

National Institute for Occupational Safety and Health Certification

The OSHA respiratory protection standard requires the use of respirators certified by NIOSH in cases in which engineering controls, such as ventilation or enclosure of hazards, are insufficient to protect workers from breathing contaminated air.[41] Surgical masks, procedure masks, and dust masks are not considered respirators. NIOSH certifies respirators pursuant to federal regulations.[42] For nonpowered respirators, such as filtering face piece respirators commonly used in health care and construction, NIOSH classifies respirators based on their efficiency at filtering airborne particles and their ability to protect against oil particles. Under the NIOSH classification system, the letter (N, R, or P) indicates the level of oil protection as follows: N—no oil protection; R—oil resistant; and P—oil proof. The number following the letter indicates the efficiency rating of the respirator as follows: 95—filters 95% of airborne particles; 97—filters 97% of airborne particles; and 100—filters 99.7% of airborne particles. Thus an N95 respirator, the most common type, is one that does not protect against oil particles and filters out 95% of airborne particles. An R or P respirator can be used in place of an N respirator.

A respirator that is past its manufacturer-designated shelf life is no longer considered to be certified by NIOSH. However, in response to potential shortages in respirators, NIOSH has tested and approved certain models of respirators for certified use beyond their manufacturer-designated shelf lives.[43]

Respirators designed for certain medical and surgical uses are subject to both certification by NIOSH (for oil protection and efficiency) and regulation by the Food and Drug Administration (FDA) as medical devices. In general, respirators with exhalation valves cannot be used in surgical and certain medical settings because, although the presence of an exhalation valve does not affect the respirator's protection afforded the user, it may allow unfiltered air from the user into a sterile field. On March 2, 2020, FDA issued an Emergency Use Authorization (EUA) to approve for use in medical settings certain NIOSH-certified respirators not previously regulated by FDA.[44]

CDC Interim Guidance on Respiratory Protection

On March 10, 2020, the Centers for Disease Control and Prevention (CDC) updated its interim guidance for the protection of health care workers against exposure to COVID-19 to permit health care workers caring for known or suspected COVID-19 cases to use "facemasks" when respirators are not available or are in limited supply.[45] This differs from the CDC's 2007

[41] 29 C.F.R. §1910.134.

[42] 42 C.F.R. Part 84.

[43] NIOSH, *Release of Stockpiled Filtering Facepiece Respirators Beyond the Manufacturer-Designated Shelf Life: Considerations for the COVID-19 Response*, February 28, 2020, at https://www.cdc.gov/coronavirus/2019-ncov/release-stockpiled-N95.html.

[44] Letter from RADM Denise M. Hinton, chief scientist, Food and Drug Administration (FDA), to Robert R. Redfield, Director, CDC, March 2, 2020, at https://www.fda.gov/media/135763/download. The list of respirators approved under this Emergency Use Authorization (EUA) is in Appendix B to this letter, updated at https://www.fda.gov/media/135921/download.

[45] Although the interim guidance does not specifically define the term *facemask*, it does differentiate between a facemask and a respirator such that any recommendation to use a facemask does not require the use of a respirator. CDC, *Interim Infection Prevention and Control Recommendations for Patients with Suspected or Confirmed*

guidelines for control of infectious agents in health care settings, which required the use of respirators for treatment of known or suspected cases.[46] CDC states that respirators should be prioritized for use in medical procedures likely to generate respiratory aerosols. Before this interim guidance was released, Representative Bobby Scott, chair of the House Committee on Education and Labor, and Representative Alma Adams, chair of the Subcommittee on Workforce Protections, sent a letter to then-Secretary of Health and Human Services (HHS) Alex Azar expressing their opposition to this change in the interim standard.[47]

Medical Evaluation and Fit Testing

The OSHA respiratory protection standard requires that the employer provide a medical evaluation to the employee to determine if the employee is physiologically able to use a respirator. This medical evaluation must be completed before any fit testing. For respirators designed to fit tightly against the face, the specific type and model of respirator that an employee is to use must be fit tested in accordance with the procedures provided in Appendix A of the OSHA respiratory protection standard to ensure there is a complete seal around the respirator when worn.[48] Once an employee has been fit tested for a respirator, he or she is required to be fit tested annually or whenever the model of respirator, but not the actual respirator itself, is changed. Each time an individual uses a respirator, he or she is required to perform a check of the seal of the respirator to his or her face in accordance with the procedures provided in Appendix B of the standard.[49] On March 14, 2020, OSHA issued guidance permitting employers to suspend annual fit testing of respirators for employees that have already been fit tested on the same model respirator.

Temporary OSHA Enforcement Guidance on the Respiratory Protection Standard

In response to shortages of respirators and other PPE during the national response to the COVID-19 pandemic, OSHA has issued five sets of temporary enforcement guidance to permit the following exceptions to the respiratory protection standard:

1. Employers may suspend annual fit testing of respirators for employees that have already been fit tested on the same model respirator;[50]

Coronavirus Disease 2019 (COVID-19) in Health care Settings, updated March 10, 2020, at https://www.cdc.gov/coronavirus/2019-ncov/infection-control/control-recommendations.html.

[46] CDC, *2007 Guideline for Isolation Precautions: Preventing Transmission of Infectious Agents in Health care Settings*, updated July 2019, at https://www.cdc.gov/infectioncontrol/pdf/guidelines/isolation-guidelines-H.pdf.

[47] Letter from Representative Robert C. "Bobby" Scott, chairman, House Committee on Education and Labor, and Representative Alma S. Adams, chair, Subcommittee on Workforce Protections, to The Honorable Alex M. Azar II, Secretary of HHS, March 9, 2020, at https://edlabor.house.gov/imo/media/doc/Azar%20Redfield%20Letter_SIGNED%202020-03-09.pdf.

[48] 29 C.F.R. §1910.134 Appendix A. Powered air purifying respirators (PAPR) that do not require a seal to the user's face do not need to be fit tested.

[49] 29 C.F.R. §1910.134 Appendix B.

[50] OSHA, *Temporary Enforcement Guidance—Health Care Respiratory Protection Annual Fit-Testing for N95 Filtering Facepieces During the COVID-19 Outbreak*, March 14, 2020, at https://www.osha.gov/memos/2020-03-14/temporary-enforcement-guidance-healthcare-respiratory-protection-annual-fit; and OSHA *Expanded Temporary Enforcement Guidance on Respiratory Protection Fit-Testing for N95 Filtering Facepieces in All Industries During the Coronavirus Disease 2019 (COVID-19) Pandemic*, April 8, 2020, at https://www.osha.gov/memos/2020-04-08/expanded-temporary-enforcement-guidance-respiratory-protection-fit-testing-n95.

2. Employers may permit the use of expired respirators and the extended use or reuse of respirators, provided the respirator maintains its structural integrity and is not damaged, soiled, or contaminated (e.g., with blood, oil, or paint);[51]
3. Employers may permit the use of respirators not certified by NIOSH, but approved under standards used by the following countries or jurisdictions, in accordance with the protection equivalency tables provided in Appendices A and B of the enforcement guidance document:
    - Australia,
    - Brazil,
    - European Union,
    - Japan,
    - Mexico,
    - People's Republic of China, and
    - Republic of Korea.[52]
4. Employers may permit the re-use of respirators decontaminated in accordance with CDC decontamination guidance;[53] and
5. Employers may permit the use of NIOSH-approved tight-fitting PAPRs in place of respirators when respirator fit-testing is not feasible due to supply issues.[54]

OSHA Infectious Disease Standard Rulemaking

In 2010, OSHA published a Request for Information in the *Federal Register* seeking public comments on strategies to control exposure to infectious diseases in health care workplaces.[55] After collecting public comments and holding public meetings, OSHA completed the SBREFA process in 2014. Since then, however, no public actions have occurred on this rulemaking. Since spring 2017, this rulemaking has been listed as a "long-term action" in the Department of Labor's semiannual regulatory agenda.

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[51] OSHA, *Enforcement Guidance for Respiratory Protection and the N95 Shortage Due to the Coronavirus Disease 2019 (COVID-19) Pandemic*, April 3, 2020, at https://www.osha.gov/memos/2020-04-03/enforcement-guidance-respiratory-protection-and-n95-shortage-due-coronavirus. Under this guidance, employers are required to address in their written respiratory protection plans when respirators are contaminated and not available for use or reuse.

[52] OSHA, *Enforcement Guidance for Use of Respiratory Protection Equipment Certified under Standards of Other Countries or Jurisdictions During the Coronavirus Disease 2019 (COVID-19) Pandemic*, April 3, 2020, at https://www.osha.gov/memos/2020-04-03/enforcement-guidance-use-respiratory-protection-equipment-certified-under.

[53] OSHA, *Enforcement Guidance on Decontamination of Filtering Facepiece Respirators in Healthcare During the Coronavirus Disease 2019 (COVID-19) Pandemic*, April 24, 2021, at https://www.osha.gov/memos/2020-04-24/enforcement-guidance-decontamination-filtering-facepiece-respirators-healthcare; and CDC, *Implementing Filtering Facepiece Respirator (FFR) Reuse, Including Reuse after Decontamination, When There Are Known Shortages of N95 Respirators*, October 19, 2021, at https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/decontamination-reuse-respirators.html.

[54] OSHA, *Temporary Enforcement Guidance—Tight-Fitting Powered Air Purifying Respirators (PAPRs) Used During the Coronavirus Disease 2019 (COVID-19) Pandemic*, October 2, 2021, at https://www.osha.gov/memos/2020-10-02/temporary-enforcement-guidance-tight-fitting-powered-air-purifying-respirators.

[55] OSHA, "Infectious Diseases," 75 *Federal Register* 24835, May 6, 2010.

Executive Order Requiring Updated OSHA Guidance and Consideration of an ETS

On January 21, 2021, President Joe Biden issued an executive order concerning COVID-19 in the workplace.[56] This executive order requires that OSHA take the following actions:

- in consultation with other agencies, issue revised COVID-19 guidance within two weeks;
- review the necessity of a COVID-19 ETS and, if necessary, issue an ETS by March 15, 2021;
- review OSHA enforcement related to COVID-19 and identify changes that could be made to better protect workers and ensure equity in enforcement;
- launch a national enforcement program to focus on violations that put the largest number of workers at serious risk of COVID-19 or violate anti-retaliation principles;
- conduct a multilingual outreach campaign in consultation with labor unions, community groups, and industries to inform workers of their rights under current law, with an emphasis on communities hit hardest by the COVID-19 pandemic;
- coordinate with state plans to ensure that workers covered by such plans are adequately protected from COVID-19 consistent with any OSHA guidance or ETS; and
- consult with states that do not operate state plans to improve protections for state and government employees.

The executive order also includes requirements for the Mine Safety and Health Administration to determine the necessity of an ETS for mineworkers and, if necessary, issue such an ETS as soon as practicable. The order also directs the heads of other federal agencies to explore ways to protect workers not covered by the OSH Act from COVID-19 in the workplace.

State Occupational Safety and Health Standards

Although no OSHA standard specifically covers aerosol or airborne disease transmission or COVID-19, two states, California and Michigan, have issued temporary standards under their state plans that directly address COVID-19 exposure. In addition, Oregon and Virginia have issued permanent COVID-19 standards, and California has had a permanent state standard covering aerosol transmission of diseases since 2009. **Table A-2** in the Appendix to this report provides a summary of these state standards.

California: Cal/OSHA Aerosol Transmissible Disease Standard

The California Division of Occupational Safety and Health (Cal/OSHA), under its state plan, promulgated its aerosol transmissible disease (ATD) standard in 2009.[57] The ATD standard covers

[56] Executive Order, "Executive Order on Protecting Worker Health and Safety," January 21, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/.

[57] *Aerosol Transmissible Diseases*, Cal. Code Regs. tit. 8, §5199, available at https://www.dir.ca.gov/title8/5199.html. The California state plan covers all state and local government agencies and all private sector workers in the state, with

most health care workers (including emergency medical services and police transport or detention of infected persons) and laboratory workers, as well as workers in correctional facilities, homeless shelters, and drug treatment programs. Under the ATD standard, SARS-CoV-2, the virus that causes COVID-19, is classified as a disease or pathogen requiring airborne isolation. This classification subjects the virus to stricter control standards than diseases requiring only droplet precautions, such as seasonal influenza.[58] The key requirements of the ATD standard include

- written ATD exposure control plan and procedures;
- training of all employees on COVID-19 exposure, use of PPE, and procedures if exposed to COVID-19;
- engineering and work practice controls to control COVID-19 exposure, including the use of airborne isolation rooms;
- provision of medical services to exposed employees, including post-exposure evaluation of employees and treatment and vaccines, if available;
- the removal, without penalty to the employees, of exposed employees,
- specific requirements for laboratory workers, and
- PPE requirements.

Cal/OSHA Aerosol Transmissible Disease PPE Requirements

The Cal/OSHA ATD standard requires that employers provide employees PPE, including gloves, gowns or coveralls, eye protection, and respirators certified by NIOSH at least at the N95 level whenever workers

- enter or work in an airborne isolation room or area with a case or suspected case;
- are present during procedures or services on a case or suspected case;
- repair, replace, or maintain air systems or equipment that may contain pathogens;
- decontaminate an area that is or was occupied by a case or suspected case;
- are present during aerosol generating procedures on cadavers of cases or suspected cases;
- transport a case or suspected case within a facility or within a vehicle when the patient is not masked; or
- are working with a viable virus in the laboratory.

In addition, a powered air purifying respirator (PAPR) with a high-efficiency particulate air (HEPA) filter must be used whenever a worker performs a *high-hazard procedure* on a known or suspected COVID-19 case.[59] High-hazard procedures are those in which "the potential for being exposed to aerosol transmissible pathogens is increased due to the reasonably anticipated generation of aerosolized pathogens"—they include intubation, airway suction, and caring for

the exception of maritime workers; workers on military bases and in national parks, monuments, memorials, and recreation areas; workers on federally recognized Native American reservations and trust lands; and U.S. Postal Service contractors.

[58] Cal. Code Regs. tit. 8, §5199 Appendix A.

[59] A PAPR uses a mechanical device to draw in room air and filter it before expelling that air over the user's face. In general, PAPRs do not require a tight seal to the user's face and do not need to be fit tested.

patients on positive pressure ventilation.[60] Emergency medical services (EMS) workers may use N100, R100, or P100 respirators in place of PAPRs.

Cal/OSHA Interim Guidance on COVID-19

Cal/OSHA has issued interim guidance in response to shortages of respirators in the state due to the COVID-19 pandemic response.[61] Under this interim guidance, if the supply of N95 respirators or PAPRs are insufficient to meet current or anticipated needs, surgical masks may be used for low-hazard patient contacts that would otherwise require the use of respirators, and respirators may be used for high-hazard procedures that would otherwise require the use of PAPRs.

Cal/OSHA COVID-19 ETS

On November 19, 2020, the California Occupational Safety and Health Standards Board approved an ETS to specifically address COVID-19 exposure in the workplace.[62] This ETS became effective on November 30, 2020, and is to remain in effect for 180 days and can be extended for up to two periods of 90 days each. California Executive Orders N-40-20 and N-71-20 each extended the ETS by 60 days such that the ETS now expires on September 30, 2021. The Cal/OSHA ETS applies to all covered employers in the state, including state and local government entities, and provides for broader protections than the Cal/OSHA ATD standard. The Cal/OSHA ETS includes specific provisions that apply to employer-provided housing and transportation.

Michigan: MIOSHA COVID-19 Emergency Rules

On October 14, 2020, the director of the Michigan Department of Labor and Economic Opportunity, which operates Michigan's state occupational safety and health plan (MIOSHA), promulgated emergency rules, with a duration of six months, to address workplace exposure to COVID-19. On April 10, 2021, the MIOSHA emergency rules were extended for an additional six months through October 14, 2021. These rules were amended, effective May 24, 2021, based on updated CDC guidance, and the amended rules will remain in effect through October 14, 2021.[63] The Michigan emergency rules apply to all employers covered by the state plan.

Oregon: Oregon OSHA COVID-19 Permanent Administrative Rules

On November 6, 2020, the Oregon Department of Consumer and Business Services, which operates Oregon's state plan (Oregon OSHA) adopted temporary administrative rules to specifically address COVID-19 exposures in the workplace. These rules were reissued to correct

[60] Cal. Code Regs. tit. 8, §5199(b).

[61] California Division of Occupational Safety and Health (Cal/OSHA), *Cal/OSHA Interim Guidance on COVID-19 for Health Care Facilities: Severe Respirator Supply Shortages*, August 6, 2020, at https://www.dir.ca.gov/dosh/coronavirus/Cal-OSHA-Guidance-for-respirator-shortages.pdf.

[62] *COVID-19 Prevention*, Cal. Code Regs. tit. 8, §§3205-3205.4, available at https://www.dir.ca.gov/dosh/coronavirus/ETS.html.

[63] *Emergency Rules: Coronavirus 2019 (COVID-19)*, available at https://www.michigan.gov//documents/leo/Final_MIOSHA_Rules_705164_7.pdf. The Michigan state plan covers all state and local government agencies and all private sector workers in the state, with the exception of maritime workers, U.S. Postal Service contractors, workers at businesses owned or operated by tribal members at Indian reservations, and aircraft cabin crew members.

"scriveners' errors" on December 16, 2020, and were set to expire on May 4, 2021. On May 4, 2021, permanent administrative rules became effective.[64] These permanent rules will remain in effect until repealed or revised by Oregon OSHA. However, the rules require Oregon OSHA to consult with state agencies and other stakeholders to determine when the permanent rules can be amended or repealed, with the first of these consultations to occur no later than July 2021. After the first consultations, ongoing consultations are required every two months until the rules are repealed.

In addition to rules that apply to all employers, the appendices to the Oregon OSHA rules also include mandatory guidance that apply to the following industries and employers:

- restaurants, bars, brewpubs, and public tasting rooms at breweries, wineries, and distilleries;
- retail stores;
- personal services providers such as hair salons;
- construction operations;
- transit agencies;
- professional and Division I, PAC-12, Big Sky, and West Coast Conference sports;
- fitness-related organizations;
- K-12 educational institutions (public or private);
- child care and early education providers;
- veterinary clinics;
- fire and emergency medical services;
- law enforcement; and
- jails and custodial institutions.

Virginia: VOSH COVID-19 Permanent Standard

On July 15, 2020, the Virginia Safety and Health Codes Board adopted an ETS to specifically protect employees from exposure to SARS-CoV-2, the virus that causes COVID-19.[65] On January 12, 2021, the Virginia Safety and Health Codes Board voted to promulgate a permanent COVID-19 standard that supersedes the ETS.[66]

[64] *Addressing COVID-19 Workplace Risks,* Or. Admin. R. 437-001-0744, available at https://osha.oregon.gov/OSHARules/div1/437-001-0744.pdf. The Oregon state plan covers all state and local government agencies and all private sector workers in the state, with the exception of maritime workers, private sector establishments within the boundaries of Indian reservations and federal military reservations, employment at Crater Lake National Park and the U.S. Department of Energy Albany Research Center, U.S. Postal Service contractors, and aircraft cabin crew members during flight operations.

[65] *Infectious Disease Prevention: SARS-CoV-2 Virus That Causes COVID-19*, 16 Va. Admin. Code §25-220, available at https://www.doli.virginia.gov/wp-content/uploads/2020/07/RIS-filed-RTD-Final-ETS-7.24.2020.pdf. This ETS was effective upon publication in a Richmond, VA, newspaper during the week of July 27, 2020.

[66] *Infectious Disease Prevention of the SARS-CoV-2 Virus That Causes COVID-19*, 16 Va. Admin. Code §25-220, available at http://www.doli.virginia.gov/wp-content/uploads/2021/01/Final-Standard-for-Infectious-Disease-Prevention-of-COVID-19-16VAC25-220-1.15.2021.pdf. This permanent standard is effective on January 27, 2021.

This ETS, promulgated under Virginia's state occupational safety and health plan (VOSH), was the first state standard to specifically address COVID-19 in the workplace.[67] As an ETS, the VOSH standard was to expire within six months of its effective date, upon expiration of the governor's state of emergency, when superseded by a permanent standard, or when repealed by the Virginia Safety and Health Codes Board, whichever came first. The VOSH permanent standard applies to all state and local government agencies and all covered private sector employees in the state and does not contain additional requirements for any specific industries.

Among the concerns raised by groups opposed to the VOSH permanent standard was that, because the standard is permanent, employers would be required to comply with the COVID-19 prevention requirements even after the COVID-19 pandemic has ended.[68] While the standard is permanent, a provision in the standard requires that within 14 days of expiration of the governor's COVID-19 state of emergency and the commissioner of health's COVID-19 declaration of public emergency, the Virginia Safety and Health Codes Board must meet to determine if there is a continued need for the standard.

Congressional Activity in the 116th Congress to Require an OSHA Emergency Temporary Standard on COVID-19

On March 5, 2020, Representative Bobby Scott, chair of the House Committee on Education and Labor, and Representative Alma Adams, chair of the Subcommittee on Workforce Protections, sent a letter to then-Secretary of Labor Eugene Scalia calling on OSHA to promulgate an ETS to address COVID-19 exposure among health care workers.[69] This letter followed a January 2020 letter requesting that OSHA reopen its rulemaking on the infectious disease standard and begin to formulate for possible future promulgation an ETS to address COVID-19 exposure.[70] Senator Patty Murray, then-ranking member of the Senate Committee on Health, Education, Labor, and Pensions and a group of Democratic Senators sent a similar letter to the Secretary of Labor calling for an OSHA ETS.[71]

In addition, in March 2020, David Michaels, who served as the Assistant Secretary of Labor for Occupational Safety and Health during the Obama Administration, wrote an op-ed in *The Atlantic*

[67] The Virginia state plan covers all state and local government agencies and all private sector workers in the state, with the exception of maritime workers, U.S. Postal Service contractors, workers at military bases or other federal enclaves in which the federal government has civil jurisdiction, workers at the U.S. Department of Energy's Southeastern Power Administration Kerr-Philpott System, and aircraft cabin crew members.

[68] See, for example, letter from Hobey Bauhan, President, Virginia Poultry Federation, to Princy Doss, Director of Policy, Planning and Public Information, and Jay Withrow, Director, Division of Legal Support, Virginia Department of Labor and Industry, January 7, 2021, http://www.doli.virginia.gov/wp-content/uploads/2021/01/Virginia-Poultry-Federation-Comments-on-Permanent-DOLI-Standard-1.7.21.pdf.

[69] Letter from Representative Scott, chairman, House Committee on Education and Labor, and Representative Adams, chair, Subcommittee on Worker Protections, to The Honorable Eugene Scalia, Secretary of Labor, March 5, 2020, at https://edlabor.house.gov/imo/media/doc/2020-03-05%20OSHA%20ETS%20Letter.pdf.

[70] Letter from Representative Scott, chairman, House Committee on Education and Labor, and Representative Adams, chair, Subcommittee on Worker Protections, to The Honorable Eugene Scalia, Secretary of Labor, January 30, 2020, at https://edlabor.house.gov/imo/media/doc/2020-01-30%20RCS%20to%20DOL%20Corona%20Letter_SIGNED1.pdf.

[71] Letter from Senator Patty Murray, ranking member, Senate Committee on Health, Education, Labor, and Pensions, Senator Robert Menendez, and Senator Tammy Baldwin, et al. to The Honorable Eugene Scalia, Secretary of Labor, March 9, 2020, at https://www.baldwin.senate.gov/imo/media/doc/20200309%20OSHA%20ETS%20Letter.pdf.

calling on OSHA to promulgate a COVID-19 ETS.[72] On March 6, 2020, the AFL-CIO and 22 other unions petitioned OSHA for an ETS on infectious diseases that would cover all workers with potential exposures.[73] OSHA formally denied the AFL-CIO petition on May 29, 2020, claiming that an ETS is not necessary to protect employees from infectious diseases generally, or from COVID-19.[74] National Nurses United submitted a similar petition requesting that OSHA promulgate an ETS based largely on the Cal/OSHA ATD standard.[75] On May 4, 2020, the Center for Food Safety and Food Chain Workers Alliance submitted a petition requesting that OSHA promulgate an ETS to protect meat and poultry processing workers from COVID-19 exposure in the workplace.[76] On May 18, 2020, the AFL-CIO petitioned the U.S. Court of Appeals for the D.C. Circuit for a writ of mandamus to compel OSHA to promulgate a COVID-19 ETS.[77] The circuit court denied this petition on June 11, 2020.

H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020

On March 9, 2020, Representative Bobby Scott introduced H.R. 6139, the COVID-19 Health Care Worker Protection Act of 2020. This bill would have required OSHA to promulgate a COVID-19 ETS within one month of enactment. The ETS would have been required to cover health care workers and any workers in sectors determined by the CDC or OSHA to be at an elevated risk of COVID-19 exposure. The ETS would have been required to include an exposure control plan provision and be, at a minimum, based on CDC's 2007 guidance and any updates to this guidance. The ETS would also have been required to provide no less protection than any state standard on novel pathogens, thus requiring OSHA to include the elements of the Cal/OSHA ATD standard and ETS, the MIOSHA emergency rule, the Oregon OSHA temporary administrative rules, and the VOSH COVID-19 standard in this ETS. Title II of the bill provided that hospitals and skilled nursing facilities that receive Medicare funding and that are owned by state or local government units and not subject to state plans would be required to comply with the ETS. Similar provisions are included in S. 3475.

P.L. 116-127, the Families First Coronavirus Response Act

The provisions of H.R. 6139 were included as Division C of H.R. 6201, the Families First Coronavirus Response Act, as introduced in the House. The American Hospital Association (AHA) issued an alert to its members expressing its opposition to the OSHA ETS provisions in

[72] David Michaels, "What Trump Could Do Right Now to Keep Workers Safe From the Coronavirus," *The Atlantic*, March 2, 2020, at https://www.theatlantic.com/ideas/archive/2020/03/use-osha-help-stem-covid-19-pandemic/607312/.

[73] Letter from Richard L. Trumka, president, AFL-CIO, to The Honorable Eugene Scalia, Secretary of Labor, March 6, 2020, at https://aflcio.org/statements/petition-secretary-scalia-osha-emergency-temporary-standard-infectious-disease.

[74] Letter from Loren Sweatt, Principal Deputy Assistant Secretary of Labor, to Richard L. Trumka, president, AFL-CIO, May 29, 2020.

[75] Letter from Bonnie Castillo, executive director, National Nurses United, to The Honorable Eugene Scalia, Secretary of Labor, and The Honorable Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, March 4, 2020, at https://act.nationalnursesunited.org/page/-/files/graphics/NNUPetitionOSHA03042020.pdf.

[76] Center for Food Safety and Food Chain Workers Alliance, *Rulemaking Petition to the United States Department of Labor, Occupational Safety and Health Administration*, May 4, 2020, at https://www.centerforfoodsafety.org/files/2020-05-04-osha-ets-petition_58890.pdf.

[77] In re: American Federation of Labor and Congress of Industrial Organizations, D.C. Cir., No. 19-1158, May 18, 2020. This petition was filed in the U.S. Court of Appeals as Section 6(f) of the OSH Act [29 U.S.C. §655(f)] grants this court exclusive jurisdiction to provide judicial review of OSHA standards.

the bill.[78] Specifically, the AHA opposed the requirement that the ETS be based on the CDC's 2007 guidance. The AHA stated that unlike severe acute respiratory syndrome (SARS), which was transmitted through the air, COVID-19 transmission is through droplets and surface contacts. Thus, the requirement of the 2007 CDC guidance that N95 respirators, rather than surgical masks, be used for patient contact is not necessary to protect health care workers from COVID-19, and the use of surgical masks is consistent with World Health Organization guidance. The AHA also claimed that shortages of available respirators could reduce the capacity of hospitals to treat COVID-19 patients, due to a lack of respirators for staff. The OSHA ETS provisions were not included in the version of the legislation that was passed by the House and the Senate and signed into law as P.L. 116-127.

H.R. 6379, the Take Responsibility for Workers and Families Act

Division D of H.R. 6379, the Take Responsibility for Workers and Families Act, as introduced in the House on March 23, 2020, included the requirement that OSHA promulgate an ETS on COVID-19 within seven days of enactment and a permanent COVID-19 standard within 24 months of enactment to cover health care workers, firefighters and emergency response workers, and workers in other occupations that CDC or OSHA determines to have an elevated risk of COVID-19 exposure. Division D of H.R. 6379 would have amended the OSH Act, for the purposes of the ETS only, such that state and local government employers in states without state plans would be covered by the ETS. The provisions of Division D of H.R. 6379 were also included in S. 3584, the COVID-19 Workers First Protection Act of 2020, as introduced in the Senate.

This legislation would have specifically provided that the ETS would remain in force until the permanent standard is promulgated and would explicitly exempt the ETS from the Regulatory Flexibility Act, Paperwork Reduction Act, and Executive Order 12866. OSHA would have been granted enforcement discretion in cases in which it is not feasible for an employer to fully comply with the ETS (such as a case in which PPE is unavailable) if the employer is exercising due diligence to comply and implementing alternative means to protect employees.

Like the provisions in H.R. 6139 and the version of H.R. 6201 introduced in the House, the ETS and permanent standard under H.R. 6379 would have been required to include an exposure control plan and provide no less protection than any state standard on novel pathogens, thus requiring OSHA to include the elements of the Cal/OSHA ATD standard and ETS, the VOSH COVID-19 standard, and the MIOSHA emergency rules in this ETS and permanent standard. Although the ETS provisions in H.R. 6139 and H.R. 6201 would have required that the ETS be based on the 2007 CDC guidance, specific reference to the 2007 guidance was not included in this legislation. Rather, under H.R. 6379, the ETS and permanent standard would have had to incorporate, as appropriate, "guidelines issued by the Centers for Disease Control and Prevention, and the National Institute for Occupational Safety and Health, which are designed to prevent the transmission of infectious agents in health care settings" and scientific research on novel pathogens.

States with occupational safety and health plans would have been required to adopt the ETS, or their own ETS at least as effective as the federal ETS, no more than 14 days after the legislation's enactment.

[78] Emily Kopp, "Hospitals want to kill a policy shielding nurses from COVID-19 because there aren't enough masks," *Roll Call*, March 3, 2020, at https://www.rollcall.com/2020/03/13/hospitals-want-to-kill-a-policy-shielding-nurses-from-covid-19-because-there-arent-enough-masks/. This alert is available to American Hospital Association (AHA) members on the AHA website at https://www.aha.org.

H.R. 6559, the COVID-19 Every Worker Protection Act of 2020

H.R. 6559, the COVID-19 Every Worker Protection Act of 2020, was introduced in the House by Representative Bobby Scott on April 21, 2020. This legislation included the ETS and permanent standard provisions of Division D of H.R. 6379 and S. 3584 and would have required that these standards cover health care workers, emergency medical responders, and "other employees at occupational risk" of COVID-19 exposure. This legislation also added two provisions that would clarify the requirements for employers to record work-related COVID-19 infections and strengthen the protections against retaliation and discrimination offered to whistleblowers. Similar provisions were included in S. 3677 and were incorporated into H.R. 6800, the Heroes Act, and H.R. 925, the revised HEROES Act, as passed by the House.

COVID-19 Recordkeeping

Sections 8(c) and 24(a) of the OSH Act require employers to maintain records of occupational injuries and illnesses in accordance with OSHA regulations.[79] OSHA's reporting and recordkeeping regulations require that employers with 10 or more employees must keep records of work-related injuries and illnesses that result in lost work time for employees or that require medical care beyond first aid.[80] Employers must also report to OSHA, within 8 hours, any workplace fatality, and within 24 hours, any injury or illness that results in in-patient hospitalization, amputation, or loss of an eye. Employers in certain industries determined by OSHA to have lower occupational safety and health hazards are listed in the regulations as being exempt from the recordkeeping requirements but not the requirement to report to OSHA serious injuries, illnesses, and deaths.[81] Offices of physicians, dentists, other health practitioners, and outpatient medical clinics are included in the industries that are exempt from the recordkeeping requirements.

OSHA regulations require the employer to determine if an employee's injury or illness is related to his or her work and thus subject to the recordkeeping requirements.[82] The regulations provide a presumption that an injury or illness that occurs in the workplace is work-related and recordable, unless one of the exemptions provided in the regulations applies.[83] One of the listed exemptions is "The illness is the common cold or flu (Note: contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work)."[84]

Because of the nature of COVID-19 transmission, which can occur in the community as well as the workplace, it can be difficult to determine the exact source of any person's COVID-19 transmission. Absent any specific guidance, this may make it difficult for employers to determine if an employee's COVID-19 is subject to the recordkeeping requirements.

[79] 29 U.S.C. §§657(c) and 673(a).

[80] OSHA's reporting and recordkeeping regulations are at 29 C.F.R. Part 1904.

[81] The list of exempted industries is at 29 C.F.R. Subpart B, Appendix A. States with state occupational safety and health plans may require employers in these exempted industries to comply with the recordkeeping requirements.

[82] 29 C.F.R. §1904.5.

[83] 29 C.F.R. §1905.5(a).

[84] 29 C.F.R. §1904.5(b)(2)(viii).

Initial OSHA Recordkeeping Guidance

On April 10, 2020, OSHA issued enforcement guidance on how cases of COVID-19 should be treated under the recordkeeping requirements.[85] This guidance stated that COVID-19 cases were recordable if they were work-related.

Under this guidance, employers in the following industry groups were to fully comply with the recordkeeping regulations, including the requirement to determine if COVID-19 cases were work-related:

- health care;
- emergency response, including firefighting, emergency medical services, and law enforcement; and
- correctional institutions.

For all other employers, OSHA required employers to determine if COVID-19 cases were work-related and subject to the recordkeeping requirements only if both of the following two conditions were met:

1. There was objective evidence that a COVID-19 case may have been work-related. This could have included, for example, a number of cases developing among workers who worked closely together without an alternative explanation.
2. The evidence of work-relatedness was reasonably available to the employer. For purposes of this guidance, examples of reasonably available evidence included information given to the employer by employees, as well as information that an employer learned regarding its employees' health and safety in the ordinary course of managing its business and employees.

Updated OSHA Recordkeeping Guidance

OSHA issued new guidance, effective May 26, 2020, on recordkeeping of COVID-19 cases.[86] This new guidance rescinds the previous guidance issued by OSHA on April 10, 2020. Under this new guidance, all employers, regardless of type of industry or employment, are subject to the recordkeeping and recording regulations for work-related cases of COVID-19. To determine if an employer has made a reasonable determination that a case of COVID-19 was work-related, OSHA says it will consider the following factors:

- the reasonableness of the employer's investigation of the COVID-19 case and its transmission to the employee;
- the evidence that is available to the employer; and
- the evidence that COVID-19 was contracted at work.

The guidance provides examples of evidence that can be used to demonstrate that a COVID-19 case was or was not work-related such as if an employee had frequent close contact with members of the public in an area with ongoing community transmission of COVID-19.

[85] OSHA, *Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)*, April 10, 2020, at https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19.

[86] OSHA, *Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)*, May 19, 2020, at https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19.

Injuries and Illnesses Caused by the COVID-19 Vaccine Are Not Subject to Recording and Reporting Requirements

OSHA guidance, issued in the form of questions and answers on the OSHA COVID-19 Frequently Asked Questions webpage on May 22, 2021, provides that the agency will not require any employers to record or report any injuries or illness resulting from the COVID-19 vaccine even if vaccination is a condition of employment. This guidance is to remain in effect through May 2022.[87]

H.R. 6559

H.R. 6559 would have required that the ETS and permanent standard established pursuant to the legislation include the requirement for the recording and reporting of all COVID-19 cases in accordance with OSHA regulations in place at the time of enactment. By referencing the regulations in place, this provision would have served to supersede OSHA's guidance from April 10, 2020, and apply the requirement, currently provided in the guidance effective May 26, 2020, to determine the work-relatedness of COVID-19 cases to all employers covered by the recordkeeping regulations.

Whistleblower Protections

Section 11(c) of the OSH Act prohibits any person from retaliating or discriminating against any employee who exercises certain rights provided by the OSH Act.[88] Commonly referred to as the whistleblower protection provision, this provision protects any employee who takes any of the following actions:

- files a complaint with OSHA related to a violation of the OSH Act;
- causes an OSHA proceeding, such as an investigation, to be instituted;
- testifies or is about to testify in any OSHA proceeding; and
- exercises on his or her own behalf, or on behalf of others, any other rights afforded by the OSH Act.[89]

Other rights afforded by the OSH Act that are covered by the whistleblower protection provision include the right to inform the employer about unsafe work conditions; the right to access material safety data sheets or other information required to be made available by the employer; and the right to report a work-related injury, illness, or death to OSHA.[90] In limited cases, the employee has the right to refuse to work if conditions reasonably present a risk of serious injury or death and there is not sufficient time to eliminate the danger through other means.[91]

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[87] OSHA, *COVID-19: Frequently Asked Questions*, at https://www.osha.gov/coronavirus/faqs#vaccine. This guidance supersedes previous guidance, issued on April 21, 2021, that required employers to record and report injuries and illnesses from the COVID-19 vaccine if the employer required the vaccine as a condition of employment.

[88] 29 U.S.C. §660(c). OSHA also enforces whistleblower provisions in 22 other federal statutes. Information on statutes with whistleblower provisions enforced by OSHA is at OSHA, *Whistleblower Statutes Summary Chart*, October 17, 2009, at https://www.whistleblowers.gov/sites/wb/files/2019-12/WB-Statute-Summary-Chart-10.8-Final.pdf.

[89] 29 C.F.R. §1977.3. Public-sector employees, except employees of the United States Postal Service, are not protected by the whistleblower provision, but may be covered by whistleblower provisions in other federal and state statutes.

[90] For additional information on other rights covered by the whistleblower protection provision, see OSHA, January 9, 2019, *Investigator's Desk Aid to the Occupational Safety and Health Act (OSH Act) Whistleblower Protection Provision*, pp. 5-7, at https://www.osha.gov/sites/default/files/11cDeskAid.pdf.

[91] 29 C.F.R. §1977.12(b)(2).

H.R. 6559 would have required that the ETS and permanent standard promulgated pursuant to the legislation expand the protections for whistleblowers. The following additional activities taken by employees would grant them protection from retaliation and discrimination from employers and agents of employers:

- reporting to the employer; a local, state, or federal agency; or the media; or on a social media platform; the following:
  - a violation of the ETS or permanent standard promulgated pursuant to the legislation;
  - a violation of the infectious disease control plan required by the ETS or permanent standard; or
  - a good-faith concern about an infectious disease hazard in the workplace;
- seeking assistance from the employer or a local, state, or federal agency with such a report; and
- using personally supplied PPE with a higher level of protection than offered by the employer.

H.R. 6800, The Heroes Act

The provisions of H.R. 6559, including the provisions relating to recordkeeping and whistleblower protections, were included as Title III of Division L of H.R. 6800, The Heroes Act. H.R. 6800, was passed by the House on May 15, 2020. In a letter to Speaker of the House Nancy Pelosi, the AHA expressed its opposition to the ETS provisions in The Heroes Act citing the potential for confusion that new regulations could bring and the "ongoing global lack of supplies, equipment and testing capability" faced by hospitals.[92] The AHA also stated that the provision that would require the ETS to be based on state standards "suggests that the federal government is surrendering its responsibility to appropriately regulate the nation to a state government agency without consideration of whether that state's decisions are appropriate for implementation anywhere and everywhere."

H.R. 925, The Heroes Act (Revised)

The provisions of H.R. 6559 and H.R. 6800 were included in the House Amendment to the Senate Amendment to H.R. 925, the revised Heroes Act, passed by the House on October 1, 2020.

P.L. 116-260, Consolidated Appropriations Act, 2021

Division N of the Consolidated Appropriations Act, 2021 (P.L. 116-260), included numerous provisions related to COVID-19. However, no provisions related to an OSHA ETS were included in this legislation.

[92] Letter from Thomas P. Nickels, executive vice president, American Hospital Association, to Hon. Nancy Pelosi, Speaker, U.S. House of Representatives, May 14, 2020, at https://www.aha.org/system/files/media/file/2020/05/web-AHALettertoHouseonHEROESAct051420final.pdf.

Congressional Activity in the 117th Congress

There has been no legislation introduced in the 117th Congress that would require OSHA to promulgate a COVID-19 ETS. On April 26, 2021, Representatives Debbie Dingell, Rashida Tlaib, and Andy Levin wrote a letter to President Biden calling for immediate action on a COVID-19 ETS and an explanation as to why an ETS has not yet been promulgated by OSHA.[93] On May 24, 2021, minority members of the House Committee on Education and Labor—citing the availability of the COVID-19 vaccine and CDC guidance that fully vaccinated persons may resume certain activities, including indoor activities, without wearing face coverings—wrote a letter to Secretary of Labor Marty Walsh urging the Department of Labor to stop work on a proposed COVID-19 ETS.[94]

[93] Representatives Debbie Dingell, Rashida Tlaib, and Andy Levin, letter to President Joe Biden, April 26, 2021, https://debbiedingell.house.gov/uploadedfiles/4.26.21_dingell_tlaib_levin_nurse_osha_letter_-_signed.pdf.

[94] Representatives Virginia Foxx et al., letter to Secretary of Labor Marty Walsh, May 24, 2021, https://republicans-edlabor.house.gov/uploadedfiles/05.24.21_osha_ets_letter.pdf.

Appendix.

Table A-1. OSHA Emergency Temporary Standards (ETS)

Year	Subject of ETS	*Federal Register* Citation of ETS	Result of Judicial Review	Judicial Review Case Citation
1971	Asbestos	36 *Federal Register* 23207 (December 7, 1971)	Not challenged	—
1973	Organophosphorous pesticides	38 *Federal Register* 10715 (May 1, 1973); amended by 38 *Federal Register* 17214 (June 29, 1973)	Vacated	*Florida Peach Growers Ass'n v. United States Department of Labor,* 489 F.2d 120 (5th Cir. 1974)
1973	Fourteen carcinogens	38 *Federal Register* 10929 (May 3, 1973)	Twelve upheld, two vacated	*Dry Color Mfrs. Ass'n v. Department of Labor,* 486 F.2d 98 (3d Cir. 1973)
1974	Vinyl chloride	39 *Federal Register* 12342 (April 5, 1974)	Not challenged	—
1976	Diving operations	41 *Federal Register* 24271 (June 15, 1976)	Stayed	*Taylor Diving & Salvage Co. v. Department of Labor*, 537 F.2d 819 (5th Cir. 1976)
1977	Benzene	42 *Federal Register* 22515 (May 3, 1977)	Stayed	*Industrial Union Dep't v. Bingham*, 570 F.2d 965 (D.C. Cir. 1977)
1977	1,2 Dibromo-3-chloropropane (DBCP)	42 *Federal Register* 45535 (September 9, 1977)	Not challenged	—
1978	Acrylonitrile (vinyl cyanide)	43 *Federal Register* 2585 (January 17, 1978)	Stay denied	*Vistron v. OSHA*, 6 OSHC 1483 (6th Cir. 1978)
1983	Asbestos	48 *Federal Register* 51086 (November 4, 1983)	Stayed	*Asbestos Info. Ass'n v. OSHA*, 727 F.2d 415 (5th Cir. 1984)

Source: CRS with data from Mark A. Rothstein, "Substantive and Procedural Obstacles to OSHA Rulemaking: Reproductive Hazards as an Example," *Boston College Environmental Affairs Law Review*, vol. 12, no. 4 (August 1985), p. 673.

Table A-2. State Occupational Safety and Health Standards That Apply to COVID-19

State	Standard	Covered Employers	Issued	Expires
California (Cal/OSHA)	Aerosol Transmissible Disease (ATD)[a]	Health care, laboratories, corrections facilities, homeless shelters, and drug treatment centers	July 6, 2009	Permanent
	COVD-19 Prevention[b]	All employers	November 30, 2020	September 30, 2021
Michigan (MIOSHA)	Emergency Rules: Coronavirus 2019 (COVID-19)[c]	All employers, with additional rules for specific industries	October 14, 2020, April 10, 2021 (extended) May 24, 2021 (amended)	October 14, 2021
Oregon (Oregon OSHA)	Addressing COVID-19 Workplace Risks[d]	All employers, with additional rules for specific industries	November 6, 2020 (ETS), reissued December 11, 2020 May 4, 2021 (permanent standard)	Permanent[f]
Virginia (VOSH)	Infectious Disease Prevention: SARS-CoV-2 Virus that Causes COVID-19[e]	All employers	July 27, 2020 (ETS), January 12, 2021 (permanent standard)	Permanent[g]

Source: Congressional Research Service (CRS).

a. Available at https://www.dir.ca.gov/title8/5199.html.

b. Available at https://www.dir.ca.gov/dosh/coronavirus/ETS.html.

c. Available at https://www.michigan.gov//documents/leo/Final_MIOSHA_Rules_705164_7.pdf.

d. Available at https://osha.oregon.gov/OSHARules/div1/437-001-0744.pdf.

e. Available at http://www.doli.virginia.gov/wp-content/uploads/2021/01/Final-Standard-for-Infectious-Disease-Prevention-of-COVID-19-16VAC25-220-1.15.2021.pdf.

f. Oregon OSHA is required to consult with state agencies and other stakeholders to determine when the permanent rules can be amended or repealed, with the first of these consultations to occur no later than July 2021. After the first consultations, ongoing consultations are required every two months until the rules are repealed.

g. Within 14 days of expiration of the governor's COVID-19 state of emergency and the commissioner of health's COVID-19 declaration of public emergency, the Virginia Safety and Health Codes Board must meet to determine if there is a continued need for the standard.

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