



NEW SHERIFF IN DC...

WHAT SHOULD LAUNDRY OPERATORS EXPECT FROM OSHA UNDER BIDEN?

Brace for tougher enforcement, including Obama-era rules that lapsed under Trump, but remain on the books

By *Todd B. Logsdon*

As the new administration is in the process of assembling its heads of various federal agencies, what should laundry operators expect to see from one of those agencies, namely the Occupational Safety & Health Administration (OSHA)?

WHAT HAS ALREADY TAKEN PLACE WITHIN THE ADMINISTRATION?

President Joe Biden (D) wasted no time in issuing multiple Executive Orders and directives to the federal agencies to begin implementing his vision and campaign promises. At least some of those were directed at the Department of Labor and OSHA, with an emphasis

on the pandemic. Specifically, Biden issued an Executive Order directing OSHA to issue updated guidance regarding COVID-19 and to evaluate and determine whether OSHA needs to issue an Emergency Temporary Standard (ETS) regarding COVID-19. If it determines that one is needed, it was expected to act in March. At press time, the agency hasn't issued an ETS, but it did initiate a National Emphasis Program (NEP) designed to protect employees at high risk, such as hospital staff. Conventional wisdom holds that OSHA will determine an ETS also is needed and will issue one shortly. At least four other states (Virginia, California, Oregon and Michigan) have already issued an ETS, and one of those has become permanent (Virginia). The updated COVID-19 guidance was issued on Jan. 29. It will likely serve as a

road map, along with the Virginia ETS, as to what a Federal OSHA ETS may include. Finally, Congress recently enacted Biden's stimulus package, known as the "American Rescue Plan Act of 2021." This measure, approved on March 11, includes a \$75-million funding boost for OSHA for COVID-related enforcement.

So, what else can laundry operators expect to see from OSHA under Biden?

NEW COVID-19 EMERGENCY TEMPORARY STANDARD; OR AN INFECTIOUS DISEASE STANDARD

As noted, Biden has directed OSHA to consider whether an ETS is needed. But OSHA could go further and issue a broader ETS for an Infectious Disease Standard that would cover COVID-19 and future viruses or diseases. OSHA may already have a head start on this. After the H1N1 pandemic, the Obama-Biden administration spent years preparing a new, permanent infectious-disease standard (www.osha.gov/infectious-diseases/rulemaking), which would have required health facilities and certain other high-exposure workplaces to permanently implement infection-control programs to protect their employees.

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

Employers should begin taking actions now to ensure that their safety policies and procedures comply with CDC guidance, and the recent OSHA guidance.

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MORE OSHA INSPECTORS

There are roughly 761 OSHA inspectors working right now, compared to about 1,000 or so who were in place a decade ago. If the Biden administration begins hiring additional investigators immediately, it likely will take around 18 months for the new inspectors to be trained and begin conducting inspections. Once those new compliance officers are in the field, employers can expect more OSHA inspectors knocking on their doors.

APPOINT OSHA CHIEF; RESTORE ADVISORY COMMITTEES

Biden already has indicated that he will ensure that all appointments to political and permanent positions in the safety agency will be filled. The Trump administration never had a permanent head of OSHA.

Expect Biden to fill the assistant secretary of labor position assigned to OSHA, likely with a safety professional with close ties to organized labor. Biden also will ensure that OSHA's advisory committees and boards are fully staffed and meet regularly. This includes committees on construction safety and health, maritime safety and general industry safety (www.osha.gov/advisorycommittees).

RESTORE THE ORIGINAL ELECTRONIC REPORTING RULE

Under the rule originally adopted in 2016 under Obama-Biden administration (www.osha.gov/recordkeeping/final-rule), OSHA began requiring certain employers (including those with more than 250 employees at a single location) to, among other things, report employee injury and illness information to OSHA. The safety agency planned to post this information online for public viewing on its website.

However, the Trump administration largely abandoned this rule.

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

INCREASE GENERAL DUTY CLAUSE CITATIONS FOR COVID-19 VIOLATIONS

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

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

During the H1N1 pandemic, (bit.ly/H1N1rule) the Obama-Biden administration tasked OSHA and the Centers for Disease Control and

Prevention (CDC) with issuing detailed guidance on how employers should protect their workers. OSHA then enforced the CDC guidelines using the GDC as an enforcement tool.

Look for OSHA under Biden to begin issuing more GDC citations if employers violate CDC guidelines for health and safety concerns related to the pandemic.

FOSTER GREATER COOPERATION WITH AND STRICTER OVERSIGHT OF STATE OSHA PLANS

Federal OSHA and the 22 state OSHA plans (www.osha.gov/stateplans) haven’t always seen eye-to-eye, and that notion has been exaggerated over the last four years. State OSHA plans have refused to adopt (bit.ly/Statepenalties) federal OSHA’s increased maximum penalties, originally adopted under the Obama-Biden administration. Meanwhile, as previously noted, other states have adopted their own Emergency Temporary Standard for COVID-19, despite the Trump administration’s refusal to do so.

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

ENFORCING THE 2016 OSHA ANTI-RETALIATION RULE

In 2016, OSHA published a final rule (bit.ly/antiretaliation) that, among other things, amended federal law to add a provision prohibiting employers from retaliating against employees for reporting work-related injuries or illnesses. See 29 C.F.R. § 1904.35(b)(1)(iv). In the preamble to the final rule

and post-promulgation interpretive documents, OSHA discussed how the final rule could apply to action taken under workplace-safety incentive programs, injury and accident reporting programs and post-incident drug-testing policies. The 2016 rule indicated, among other things, that blanket automatic post-accident drug-testing is improper because it has been shown to discourage employees from properly reporting injuries.


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

Despite the 2018 clarification, the original version of Obama-Biden rule remains in effect. OSHA likely will begin enforcing the rule in 2021. Thus, employers may want to reconsider any blanket post-accident drug-testing policies. Instead, they should consider drug testing when “employee drug use is likely to have contributed to the incident, and for which the drug test can accurately identify impairment caused by drug use.” Consider adopting a more reasonable-suspicion-based standard.

BOTTOM LINE: BEEFED-UP OSHA ENFORCEMENT

Operators should expect that workplace safety enforcement will be more aggressive under an OSHA led by the Biden administration. Employers should take actions now to ensure that their safety and health programs comply with rules that, although not enforced during the Trump presidency, remain in place and govern American workplaces.

You should continue to provide safe workplaces for your employees and invest in resources to identify and eliminate workplace safety hazards at your worksite, in anticipation of greater enforcement efforts by OSHA during the next four years. **IS**

 **TODD LOGSDON**, a lawyer/partner with Fisher & Phillips, Louisville, KY., will co-present “*Contractor Safety: Orientation & Training*,” with Cintas Corp.’s Frank Makson on April 21 at TRSA’s HR, Health & Safety Summit.



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