**Will a Biden Administration Issue an Emergency Standard**

**on COVID-19 through OSHA?**

There have been indications that a Biden Administration may use OSHA’s power to use emergency temporary standards to create a federal OSHA emergency standard on COVID-19.

**Background**

The Trump Administration has not wanted to issue an emergency standard, stating OSHA has the current tools and standards in place to address the current pandemic. However, Biden has urged President Trump previously to immediately release and enforce an emergency temporary standard. The Obama-Biden administration also spent years preparing a permanent infectious disease standard. Some in Congress and in healthcare groups have been calling for a COVID-related standard. Given the significant impact of the current COVID-19 pandemic, a temporary emergency standard might be issued, leading into a permanent standard addressing infectious diseases.

**OSHA’s Emergency Temporary Standards Authority**

Under certain limited conditions, OSHA is authorized to set emergency temporary standards that take effect immediately and are in effect until superseded by a permanent standard. OSHA must determine that workers are in grave danger due to exposure to toxic substances or agents determined to be toxic or physically harmful or to new hazards and that an emergency standard is needed to protect them. Then, OSHA publishes the emergency temporary standard in the Federal Register, where it also serves as a proposed permanent standard. It is then subject to the usual procedure for adopting a permanent standard except that a final ruling should be made within six months. The validity of an emergency temporary standard may be challenged in an appropriate U.S. Court of Appeals.

**A Potential Roadmap to a Federal Standard – State OSHA Standards Already in Place**

In total, 14 states have adopted comprehensive COVID-19 worker protections through executive order and/or their state OSHA programs. Currently, there are 4 states that have issued a state-specific OSHA emergency standards through their state OSHA: Virginia, Michigan, Oregon and California.

Virginia was the first to implement an emergency COVID-19 standard on July 27, 2020. In Michigan, after an initial Executive Order by Governor Gretchen Whitmer was overturned by the Michigan Supreme Court, Michigan OSHA issued COVID-19 Emergency Rules on October 14, 2020. Michigan OSHA was able to use emergency status to bypass formal rulemaking. Oregon’s state OSHA rule took effect November 16, 2020 and is expected to remain in effect through May 4, 2021, and California’s Cal/OSHA adopted its Emergency COVID-19 Prevention Rule effective November 30, 2020.

**These states’ plans may become a guideline for a federal standard.**

**What May Employers Be Required to Develop in a Federal Standard?**

There are common themes between the policies of these 4 states and they have pulled items from each other. These items would likely become a part of a federal emergency standard:

**Conducting a Workplace Assessment**

This would include identifying employee tasks, work environment, presence of the virus, number of employees, facility size, working distances, duration and frequency of exposure, and hazards encountered.

**Develop an Exposure Control Plan**

This would include designating an on-site COVID coordinator, providing free face coverings and requiring their use, signage, social distancing, barriers, remote working, prohibiting sick employees access to facility, enhanced cleanings for positive cases, employee screenings, and notification of positive cases.

**Implement Controls**

This includes maximizing current ventilation systems, installing barriers, partitions, and airborne infection isolation rooms.

**Training Employees**

Training would need to be specific to the place of employment. Included would be reviewing control measures, proper use of PPE, how to report symptoms or positive cases, how to report unsafe working conditions, and an overview of the COVID-19 virus, symptoms, and means of transmission.

**Maintain Records of Training, Screenings, and Notifications**

This would include employee training, employee and visitor screenings, notifications as required to individuals and Health Departments.

**How Often Have Emergency Standards Been Used Before?**

OSHA has used emergency temporary standards 9 times. The last time they were used was in 1983 for asbestos. OSHA’s first emergency standard was also created for asbestos, and others have been created mostly for chemicals, including 12 different carcinogens, benzene and vinyl chloride. Most standards have been challenged in court, and although there have been a few that have been vacated, most have remained in place.

###

iSi will be monitoring developments with federal OSHA and will update this article, or provide additional information in our blog as information continues to develop regarding this issue.