

Environmental and Workplace Health & Safety

Where is OSHA's COVID-19 ETS? No Where the Ides of March



By: [Gabrielle Sigel](#)

On his first full day in office, President Biden issued an Executive Order on *Protecting Worker Health and Safety*, which required OSHA to “consider whether any emergency temporary standards on COVID-19, including with respect to masks in the workplace, are necessary,” and if so, to issue such emergency temporary standards (ETS) by March 15, 2021. [Executive Order](#) 13999, § 2(b) (Jan. 21, 2021), 86 FR 7211 (Jan. 26, 2021). An ETS, which skips the initial notice and comment process before it is in effect, can be issued pursuant to Section 6(c) of the OSH Act if OSHA determines that employees are exposed to “grave danger” and that an emergency standard is “necessary” to protect them from the grave danger. 29 USC § 655(c).

March 15, 2021 came and went; no ETS was issued. As of this writing, OSHA has not made a public statement as to why it did not issue an ETS on March 15, or the agency's considerations and future plans regarding an ETS. Why might OSHA have chosen not to act now? What has OSHA done instead? What ETS might be on the horizon?

Why Might OSHA Have Decided Not to Issue an ETS Now?

There is considerable legal risk that a COVID-19 ETS will not hold up in court. OSHA has not successfully issued an ETS since 1978. Its last *attempt* to issue an ETS would have regulated asbestos exposure and was invalidated by the US Court of Appeals in 1984. In *Asbestos Info. Ass'n v. OSHA*, 727 F.2d 415 (5th Cir. 1984), the court rejected the ETS because OSHA did not sufficiently support its conclusion of a “grave danger,” *i.e.*, that 80 people would die in the next six months without the ETS and that OSHA could not show that an asbestos ETS was “necessary” given its existing respiratory standard.

As an additional legal hurdle, OSHA, in the last administration, has already gone on record that an ETS is unnecessary, and won that position in federal court. On June 11, 2020, the US Court of Appeals for the DC Circuit [denied](#) the AFL-CIO's petition for a writ of mandamus to compel OSHA to issue an ETS for Infectious Diseases. The three-judge panel found that “OSHA reasonably determined that an ETS is not necessary at this time” given the “unprecedented nature of the COVID-19 pandemic, as well as the regulatory tools that the OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments, see 29 U.S.C. § 654(a).” The panel held that “OSHA's decision not to issue an ETS is entitled to considerable deference.”

Moreover, supporting the “grave danger” element for a COVID-19 ETS is challenging for OSHA, especially because the March 15 deadline gave it only two months to assemble the data and proof necessary. Further compounding the timing challenge, there are data gaps from the prior Administration, making it difficult to prove that any particular regulatory action would eliminate the grave danger. In addition, with vaccines becoming increasingly available, predicting how many workers would be protected from “grave danger” in the near future confounds easy statistical prediction. Regarding the “necessity” element, the Department of Labor Office of Inspector General's [February 25, 2021 report](#) (the [OIG Report](#)) criticizes OSHA's pandemic performance as deficient, but it principally blames OSHA's “reduced inspections and most inspections not being conducted onsite” as the reasons that employees were subjected to “greater safety risk.” *OIG Report* at p. i. On the other hand, the *OIG*

Report also urges OSHA to consider an ETS, noting that OSHA's COVID-19 guidance is not enforceable, but it also states that OSHA can rely on its guidance as evidence to support a General Duty Clause claim. *OIG Report*, pp. 10-14. Thus, perhaps inadvertently, the *OIG Report* more strongly demonstrates that deficiencies in OSHA's workplace safety protection were due to lack of enforcement, not *necessarily* the lack of tools to do so.

In addition to legal risks, the political risks to OSHA and the Biden Administration from a national ETS are substantial, particularly at this time. The President and his closest advisers are on a cross-country tour, promoting the American Rescue Plan and a nationwide vaccination rollout. In addition, the President announced on day one of his administration that he intends to include private sector businesses in his [National Strategy for the COVID-19 Response and Pandemic Preparedness](#); the President may not want to distract those employers and the working public with a different message that could be generated by a new COVID-19 ETS.

No doubt there is strong political support, among labor and other constituencies, for an ETS. OSHA has received such demands, including in the nomination hearings on Mayor Marty Walsh as Secretary of Labor, from labor and other advocates. They have suggested basing an ETS on the Virginia standard, the California ETS, or OSHA's own guidance. On February 15, 2021, former HHS and OSHA officials, joined by other public health luminaries, called on the federal COVID-19 Pandemic Response members, as well as OSHA, to revise OSHA guidance and regulations, including by requiring healthcare workers and workers "at very high risk of exposure and infection such as in food processing, prisons, and security" to be provided N95 respirators, so that they need not rely solely on face coverings. [Letter from R. Bright, et al.](#), "Immediate Action is Needed to Address SARS-CoV-2 Inhalation Exposure" (Feb. 15, 2021). The letter also called on OSHA to issue an ETS "that recognizes the importance of aerosol inhalation, includes requirements to assess risks of exposure, and requires implementation of control measures following a hierarchy of controls." On February 10, 2021, the American Industrial Hygiene Association and eight other scientific organizations issued a [Joint Consensus Statement](#) asking that OSHA issue a COVID-19 ETS.

In contrast, on February 25, 2021, [House Republican members](#) urged the Acting Secretary of Labor not to move quickly on an ETS, citing the difficulties that the California Division of Occupational Safety & Health had when it issued a COVID-19 ETS that quickly had to be modified, by order of the Governor, due to new CDC guidance. Given that by March 15 the Senate had not confirmed the nomination for a Secretary of Labor or an Assistant Secretary for OSHA, issuing an ETS without confirmed leaders puts the department and OSHA at further political risk.

Given these significant political risks and legal hurdles, it should be no surprise that OSHA's March 15, 2021 decision on an ETS is: "not now."

What COVID-19 Programs Has the Biden Administration's OSHA Issued to Date?

President Biden's *Executive Order* instructed OSHA to take several COVID-19 workplace safety actions, including: (1) issue "revised guidance" by February 4, 2021; (2) enhance enforcement; and (3) as discussed above, consider and, if necessary, issue a COVID-19 ETS by March 15. Executive Order 13999, § 2. With respect to that first action, OSHA beat the President's deadline issuing a revised guidance eight days later on January 29, 2021. The new "[stronger](#)" guidance document, entitled *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace* ([Protecting Workers Guidance](#)), used more resolute language, such as directives that employers "should" implement certain programs, provided more details on a range of elements, including emphasizing communication to workers in native languages and non-retaliation, and incorporated recent CDC guidance.

Introducing the principal elements of its *Protecting Guidance*, OSHA reiterated employers' obligation under the General Duty Clause, and stated that, "[i]mplementing a workplace COVID-19 prevention program is the most effective way to mitigate the spread of COVID-19 at work." One new element in

OSHA's *Protecting Workers Guidance* is its reference to COVID-19 vaccination, stating that an employer's effective COVID-19 Prevention Plan should: "Ma[k]e a COVID-19 vaccine or vaccination series available at no cost to all eligible employees," and employers should provide information about "the benefits and safety of vaccinations." However, because the science on whether the vaccine prevents transmission is not settled, employers should be sure to not "distinguish[] between workers who are vaccinated and those who are not," with regard to continuing protective measures, such as face coverings. However, as in all of the COVID-19 guidance documents, OSHA reiterated that its document "is not a standard or regulation, and it creates no new legal obligations."

Then on March 12, 2021, just days before the ETS "deadline," OSHA took [two significant new actions](#) to enhance its enforcement actions regarding COVID-19 workplace safety: (1) establishing the National Emphasis Program – COVID-19 (the [NEP](#)) targeting higher hazard industries for OSHA enforcement action; and (2) updating and replacing its former Interim Enforcement Response Plan for COVID-19 (the [Enforcement Plan](#)) to prioritize in-person worksite inspections by OSHA Compliance Safety and Health Officers (CSHO). These actions directly respond to President Biden's Executive Order directing OSHA to "launch a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risk or are contrary to anti-retaliation principles." [Executive Order \(EO\) No. 13999](#), § 2(d), 86 FR 7211 (Jan. 26, 2021).

A National Emphasis Program is an OSHA enforcement policy procedure through which OSHA decides how it is selecting sites for enforcement initiatives. An OSHA enforcement response plan informs CSHOs how to conduct their enforcement activities. In this case, the COVID-19 NEP and the Enforcement Plan together tell employers *the categories of workplaces and the types of enforcement procedures* that are OSHA's highest COVID-19 safety priorities. In the NEP, OSHA targets specified industries whose workers "have increased potential exposure to [a COVID-19] hazard, and that puts the largest number of workers at serious risk." NEP, p. 1. The NEP also focuses on making sure that "workers are protected from retaliation," including by referring allegations of retaliation to OSHA's Whistleblower Protection Program. *Id.* OSHA makes clear that its NEP is to "augment" its continuing enforcement actions at all workplaces where it receives a complaint, severe incident report, or referral involving COVID-19 safety issues.

In the Enforcement Plan, OSHA instructs its Area Directors and CSHOs to "prioritize COVID-19-related inspections involving deaths or multiple hospitalizations due to occupational exposures to COVID-19" and "[w]here practical ... perform on-site workplace inspections." The Enforcement Plan provides greater detail about how the CSHO should conduct a COVID-19-related investigation and inspection, and the bases for citations issued to employers. While not addressing whether or when an ETS will be issued, OSHA buried in the text of both the NEP and the Enforcement Plan a few statements that "in the event that" OSHA issues an ETS, the ETS will be used instead of the General Duty Clause as the basis for citations with respect to COVID-19 safety violations, which will be enforced through the new NEP and Enforcement Plan.

What Might a COVID-19 ETS Look Like?

If OSHA were to issue a COVID-19 ETS, it may not be as comprehensive as either the Virginia COVID-19 standard or the California COVID-19 ETS. For example, OSHA may decide to focus on specific procedures for a targeted industry, perhaps adopting a standard like California's Aerosol Transmissible Diseases standard that applies only to the healthcare industry. Or OSHA may decide to issue a more comprehensive regulation, but target high hazard industries, such as healthcare, congregate living facilities, meat processing plants, and/or manufacturing facilities, such as it just did in the COVID-19 NEP. That more comprehensive ETS could have the same substance of its most recent *Protecting Workers Guidance*.

As another alternative, OSHA may decide to focus an ETS solely on mask-wearing in the workplace, including in response to certain states' recent decisions to eliminate a mask mandate. This approach may mirror what other federal agencies have already done. On January 30, 2021, the CDC issued a

nationwide order requiring masks of a certain type to be worn, by the public and workers, in and on airplanes, trains, buses, and various modes of surface transportation, including in stations and terminals. *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*. CDC Agency Order, 86 FR 8025 (Feb. 3, 2021). On January 31, 2021, TSA issued a Security Directive for enforcing the CDC Order. [Security Directive 1582/84-21-01](#).

On March 1, 2021, the Federal Railroad Administration (FRA) issued the *Emergency Order Requiring Face Mask Use in Railroad Operations*, stating that it was “exercising its emergency railroad safety authority” to require rail carriers to require mask wearing by railway workers “while engaged in railroad operations.” [86 FR 11888](#), 11890 (Mar. 1, 2021). The FRA Emergency Order may be the best example to date for an OSHA mask-only ETS, in that the FRA is required to justify its Emergency Order as necessary to address an emergency safety situation. To support its Emergency Order, the FRA noted that it has authority to issue emergency orders to address an unsafe practice that “causes an emergency situation involving a hazard of death, personal injury, or significant harm to the environment,” including “restrictions and prohibitions... that may be necessary to abate the situation.” 86 FR at 11888, citing 49 U.S.C. § 20104. The FRA justified its emergency order by describing the impact of the pandemic generally; concerns about virus variants that spread more easily and quickly; and its field observations of railway personnel not wearing masks. The FRA stated that its emergency order was “necessary...to ensure a minimum level of nationwide compliance, together with the [TSA’s Security Directive].” 86 FR at 11890. The FRA also referred to the railroad transportation system being essential for public health, the economy, and “other bedrocks of American life.” *Id.* While applicable only to a specific industry, the FRA emergency order may indicate a targeted approach that OSHA may take at all workplaces, *i.e.*, requiring the wearing of face masks at workplaces and in the work environment when a worker is exposed to others, except for narrow exceptions.

Particularly after the new Secretary of Labor is sworn in, we may well see an OSHA ETS. In any case, that ETS, if issued this year, will not have an Ides of March date, and its negative connotations, as an additional burden.

For more information or advice on the OSHA standards and enforcement during the pandemic, please contact the [author](#). Additional information regarding working during the COVID-19 pandemic can be found in [Jenner & Block’s Corporate Environmental Lawyer blog](#) and in the [Jenner & Block COVID-19 Resource Center](#).

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

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