EMPLOYMENT LAWSCENE ALERT: WORKPLACE SAFETY IS A TOP PRIORITY FOR THE BIDEN ADMINISTRATION

In our series discussing the new workplace initiatives under the Biden Administration, we will first look at the Biden Administration's efforts on protecting worker health and safety.

Simply, under the Biden Administration, employers should expect to see a more robust Occupational Safety and Health Administration (OSHA), meaning ramped-up OSHA enforcement efforts, including more workplace inspections, more whistleblower protection, and the likely issuance of an emergency temporary standard to address the hazards of COVID-19 in the workplace. In light of the Biden Administration's concerted focus on workplace safety, it behooves all employers to take notice of OSHA's new enforcement policies now, and to review and update, if necessary, all health and safety programs before OSHA knocks on your door.

New DOL Secretary and Deputy Assistant Secretary of Labor for OSHA

To lead the Biden Administration's charge in making workplace safety a top priority, President Biden has nominated Marty Walsh to be the new Secretary of Labor. Walsh is the former mayor of Boston and the former union leader of Boston's Building and Construction Trade Council, an umbrella group of 20 local construction unions. Many believe that Secretary nominee Walsh will be a strong and ardent advocate for worker safety given his background in the construction industry and his former roles as mayor and union leader where he was a strong vocal proponent for more stringent safety regulations for workers.

During his Senate confirmation hearing, Walsh committed to improving workplace safety by increasing the number of OSHA compliance officers and making sure that OSHA has the tools in place to protect workers during the COVID-19 crisis — Walsh's comments would seem to indicate that employers should expect an emergency temporary standard on mitigating and eliminating COVID-19 hazards in the workplace, a national emphasis program on COVID-19, and increased inspections in workplaces where workers work in close proximity with other workers or customers.

To manage OSHA's new policies and expected emphasis programs, President Biden has chosen James Frederick, the former Assistant Director of the United Steelworkers' Health, Safety and Environment Department to lead OSHA to be the Deputy Assistant Secretary of Labor for OSHA. Fredrick has already commented that OSHA's new guidance on preventing COVID-19 in the workplace is OSHA's "first step" to make it clear "that OSHA is advocating for workers."

President's Executive Order and OSHA's New Guidance on COVID-19 in the Workplace

On January 21, 2021, the day following the Presidential inauguration, President Biden issued an Executive Order outlining his administration's policy on protecting the health and safety of workers from COVID-19. President Biden's Executive Order established a five-step plan to combat COVID-19 in the workplace by requiring the Secretary of Labor, acting through the Deputy Assistant Secretary of Labor for OSHA, to:

1. Issue within two weeks revised OSHA guidance on workplace safety during the COVD-19 pandemic;
2. Consider, by March 15, 2021, whether any emergency temporary standards on COVID-19, including the use of masks in the workplace, are necessary;
3. Review the enforcement efforts of OSHA related to COVID-19 and to identify any changes that can be made to better protect workers and ensure equity in enforcement;
4. Launch a national program to focus OSHA enforcement efforts related to COVID-19 on violations that put the largest number of workers at serious risks or are contrary to anti-retaliation principles; and
5. Coordinate with the Department of Labor's Office of Public Affairs and Office of Public Engagement and all regional OSHA offices to conduct a multilingual outreach campaign to inform workers and their representatives of their rights under applicable law.

On January 29, 2021, consistent with President Biden's Executive Order, OSHA issued a detailed guidance entitled "Protecting Workers: Guidance on Mitigation and Preventing the Spread of COVID-19 in the Workplace." While not legally binding, OSHA, through this guidance, instructs employers on the appropriate control measures that should be implemented in the workplace to help mitigate and prevent the spread of COVID-19. Such measures include: conducting a hazard assessment; identifying a combination of measures that limit the spread of COVID-19 in the workplace (e.g., wearing face masks and social distancing), adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace; and implementing protections from retaliation for workers who raise COVID-19 related concerns. Employers should consider this guidance as the stepping stone for OSHA to issue an emergency temporary standard on mitigating and eliminating COVID-19 in the workplace — a directive that President Biden's Executive Order has mandated to be achieved by March 15, 2021.

A COVID-19 National Emphasis Program is Possible

If OSHA issues an emergency temporary standard on mitigating and eliminating COVID-19, employers should also expect that a COVID-19 national emphasis program will come along with it. A COVID-19 national emphasis program will permit OSHA to ramp up inspections and target workplaces where OSHA believes, based on industry and Centers for Disease Control and Prevention ("CDC") data, that workers are most at risk for COVID-19. Presumably, OSHA will target those places of employment where workers work in close proximity to other

workers or are forward-facing with customers and the general public. This can include meatpacking plants, warehouses, fulfillment centers, grocery stores, and other retail stores where workers have close contact with customers. If a COVID-19 national emphasis program is established, employers will be chosen randomly by OSHA for inspection based on program criteria rather than based on complaints or reports of accidents. Most employers believe that if they can prevent workplace accidents and avoid having employees complain to OSHA, they can avoid an OSHA inspection, but employers who fall within a national emphasis program's criterion must always be mindful that an OSHA inspection can occur at any time. The question for these employers is will they be ready for an OSHA inspection when OSHA comes knocking.

COVID-19 and a Robust OSHA Requires Employers to Be Proactive

Employers should expect that OSHA will take a stronger and more enforcement-oriented approach to addressing COVID-19 in the workplace through new directives, emergency temporary standards, and policy guidelines mandated by the new Biden Administration. This will require employers to formalize, in writing, their COVID-19 response plan in the same manner that other safety programs are written and to also conduct regular training for all its workers to educate them on what actions they can take to help prevent the spread of COVID-19 in the workplace. Such training should include the obvious health and safety controls that can be put in place such as the requirement that all workers wear face masks, maintain social distancing, and that workers who are ill or exhibiting signs or symptoms of COVID-19 are sent home until they are cleared to return to work based on CDC guidelines.

Finally, employers should also note that as the COVID-19 vaccine becomes more widely available, employers should encourage all their workers to become vaccinated. OSHA recommends, however, that the same safety measures that are in place now to combat COVID-19 should remain in place even after workers are vaccinated. That is, both vaccinated and unvaccinated workers should follow the same safety measures, such as wearing masks and maintaining social distancing, because the CDC has not yet determined whether a vaccinated individual can transmit the COVID-19 virus even though they may have immunity based on having received the vaccination. As a result, assuming that an emergency temporary standard on COVID-19 will be issued by OSHA, employers should take note that having a vaccinated workforce may not immune their workplace from OSHA citations if COVID-19 safety measures are not being followed and enforced.

As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have regarding OSHA's new policies and directives under the Biden Administration.