



WHY WAS OSHA'S COVID-19 EMERGENCY TEMPORARY STANDARD PLACED IN "LIMBO" BY SECRETARY OF LABOR WALSH?

The hotel and resort industry needs to monitor closely the developments in the federal OSHA rulemaking process with regard to the Covid-19 crisis. The proposed rules under consideration will place unnecessary, costly and permanent burdens on employers in those industries to address a hazard which may be lessening everyday as millions of individuals are being inoculated by the disease. As we have seen with temporary and permanent standards dealing with the disease in certain states, employers could be faced with mandatory "exclusion pay," significant building ventilation requirements and extensive personal protection equipment mandates. The following alert provides an up to the minute evaluation of where this rulemaking may be headed by the former Chairman of the Occupational Safety and Health Review Commission.

On January 21, 2021, President Biden signed an [executive order](#) directing OSHA to consider issuing an Emergency Temporary Standard ("ETS") related to COVID-19. If the ETS is deemed necessary, the executive order instructed OSHA to issue it by March 15, 2021. Now, nearly three and a half weeks past that date, the ETS has just been placed on "hold" by Secretary of Labor Marty Walsh.

Secretary Walsh stated that the ETS is being suspended because the proposed standard that he reviewed did not "reflect the latest scientific analysis of the state of the disease." The focus on the state of the disease suggests Secretary Walsh and his team at OSHA realize that there is no longer an emergency due to the rate of vaccinations throughout the country and many of the U.S. population will be vaccinated in a matter of months. That eventuality presents a significant roadblock for OSHA. The Occupational Safety and Health Act does not permit the issuance of an emergency standard unless the hazard the standard addresses pose a "grave danger" when issued.

If COVID-19 deaths keep declining at the current rate, it may be difficult, if not impossible, for OSHA to meet that burden.

Another likely and significant reason that the ETS has been placed on hold is that OSHA struggles to demonstrate that the benefits the ETS is supposed to achieve are justified. Given the significant costs to employers in complying with the requirements of such a new rule. One provision that could be burdensome would be requiring employers to continue to provide employees with pay and benefits for the entire period an employee "with exposure" to the virus is excluded from the workplace under the standard's required quarantine period (the new term, "exclusion pay"). California's state COVID-19 ETS requires employers to pay such "exclusion" pay and benefits.

OSHA may also be expecting that the ETS will likely be challenged immediately in federal court. OSHA has had problems defending emergency standards in federal court in the past.

There is a minimal division within the Executive Branch's Office of Management and Budget ("OMB"), known as the Office of Information and Regulatory Affairs ("OIRA"). OIRA was established by Congress in the 1980 Paperwork Reduction Act and is staffed by approximately 45 federal government employees who review drafts of proposed regulations under various statutes and executive orders, including Executive Order 12866 issued by President Clinton on September 30, 1993. That executive order requires OIRA to conduct, among other things, an analysis of the costs and benefits of proposed rules and to determine if the alleged benefits of the rule justify the costs. Before Secretary Walsh put the

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COVID-19 ETS on the back burner, the lawyers working on the ETS for OSHA still had not “officially” forwarded the regulation to OIRA. (Many in Washington believe that the ETS was reviewed by OIRA officials while negotiations were ongoing between the White House and OSHA but not posted on the OIRA website indicating the review had officially commenced). Many observers of OSHA’s work regarding this ETS were not surprised that OIRA never formally recognized that the proposed rule was under review. They recognized early on, as did apparently those advising Secretary Walsh, that OIRA’s cost/benefit analysis may not be the favorable finding OSHA needed as more and more Americans are vaccinated every day and the justification for an ETS diminishes.

Although an ETS may have stalled out, OSHA could very well shift to a proposal for a permanent “Infectious Disease” standard. Such a standard would govern all infectious diseases such as TB, influenza, and MRSA. OSHA initiated the rulemaking process for such a standard in 2014 under the Obama Administration. Still, the proposed rule was placed in what the DOL calls “long-term action” in the Spring of 2017. There is growing speculation now that OSHA, under Secretary Walsh’s direction, will use the current standard COVID-19 pandemic as a reason to reinstate that process again with the hope of finally getting such a standard issued. In 2014, OSHA justified the need for such a standard because it believed that the transmission-based infectious control guidelines in existence at that time were not consistently followed. It will be interesting to see if OSHA can make a similar claim after the entire world has been subject to and follow such guidelines.