

APRIL 18, 2023 | OSHA RULEMAKINGS & STANDARDS

A Status Update About OSHA's Rulemaking For a Permanent COVID-19 Rule for Healthcare

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We wanted to provide a little status report about OSHA's quiet [rulemaking for a permanent COVID-19 Standard for Healthcare](#). A few weeks ago, at the ABA WOSH Committee Midwinter meeting, multiple senior Department of Labor officials, including Doug Parker (Head of OSHA) and Seema Nanda (the Solicitor of Labor), were asked some pointed questions about the rulemaking. They were all pretty tight-lipped and evasive. We pointed out  to the Solicitor of Labor that the very day on which we were talking about the rulemaking was the 90th day since OSHA had delivered the proposed final rule to the White House's Office of Management Budget for a "final review." Pursuant to Executive Order 12866, a proposed final rule generally cannot remain at OMB for longer than 90 days unless the regulating agency (in this case, OSHA) requests an extension of the review period. The Solicitor of Labor was asked if the Department of Labor or OSHA had already or was intending to seek such an extension, or whether the agency had decided to withdraw the proposed final rule in light of the changing circumstances of the pandemic and President Biden's withdrawal of the emergency declaration. She sidestepped the question, stating that OMB can extend the review period at least another 30 days without any formal action by the Department of Labor, but would not say what OMB's or OSHA's plans were for the rule.

The one-time, automatic 30-day extension of OMB's 90-day review period is consistent with our understanding too. See the excerpt below from [OMB OIRA FAQs](#):



Doug Parker similarly noted only that the proposed rule was still at OMB, but that OSHA was now more focused on its work on a permanent general airborne infectious disease standard. Another senior OSHA representative who was asked specifically whether OSHA had or was planning to withdraw the proposed final rule responded: "not yet."

The proposed rule had been at OMB for 120-days (the full 90-day initial review period plus the one 30-day automatic extension) as of April 6th, so we started pressing the refresh button on OIRA's website quite a few times that week to see if there would be any updates on the status of the rulemaking. Alas, as of today, there have been no changes on OIRA's website about the rulemaking. It still states that the proposed rule is "pending review." See the screenshot below:



So earlier this week, we reached out to our contacts at OMB about the status of the rulemaking, and in particular, whether any request from the Department of Labor had been received to extend the review period. Here is a response we received:

“This rule remains under EO 12866 review. Requests to extend review are not made public, but in cases where a rule continues to be under review beyond the 90-day timeframe in the Executive Order, it is be reasonable to assume that the review has been extended.”

That is a pretty interesting response. Since we are well beyond the initial 90-day review period, and even beyond the automatic one-time 30-day extension period, reading between the lines here, we think we can infer that OSHA has affirmatively sought to extend the OMB review period. That is, OSHA is not ready to toss the rule in the wastebin, and we are not completely out of the woods yet. That said, practically and politically, barring some new surge in cases or the revelation of some harmful new variant, it really seems unlikely that the Biden Administration will allow OSHA to issue another COVID-19 rule. It was already pretty politically fraught when OSHA sent it to OMB this winter, but at least at that time, the nation was experiencing a winter surge of COVID-19 cases. If the Administration was to issue the rule now, they would just look completely out of touch. But, of course, that does not mean it will not happen, and the response from OMB means that cannot be ruled out yet.

Unfortunately, the review period can be extended by the rulemaking agency “indefinitely,” so we do not have a new target date to track at this point. We will keep refreshing the OIRA website and looking for opportunities to get answers from OSHA or OMB. For now, though, no news is good news.