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OSHA's Emergency Response Rulemaking Covers Private Employers With Designated Emergency Responders – Join CMC's Employers Rulemaking Coalition

By Eric J. Conn, Kate M. McMahon, and Beeta B. Lashkari

OSHA is sure not letting the regulated community ease into the new year. Indeed, right as we were shutting down for the holidays, OSHA slid a little gift under the tree in the form of yet another proposed regulation. Specifically, on December 21, 2023, OSHA revealed a pre-publication proposed "Emergency Response" Rule, which it will publish any day now. The rulemaking is designed to update OSHA's existing "Fire Brigades" standard and to expand safety and health requirements related to emergency responders – both public and private.

We are writing to gauge your organization's interest in participating in a coalition of employers and trade associations to work on this OSHA rulemaking.

Background About OSHA's Emergency Response Rulemaking

So you would not have to, we have poured through the 600+ page pre-publication Notice of Proposed Rulemaking (NPRM) package. Per OSHA, the soon-to-be-proposed "Emergency Response" Rule will update safety and health protections in line with national consensus standards for a broad range of workers exposed to hazards that arise during and after fires and other emergencies. Particularly, ***the standard will apply to Workplace Emergency Response Employers ("WERE"), a term that applies to private employers engaged in industries such as manufacturing, processing, and warehousing that have, or establish, a Workplace Emergency Response Team ("WERT")***. OSHA explains that employees on the WERT are those who, either as a primary or collateral duty of their regular daily work assignments, respond to emergency incidents to provide services such as firefighting, emergency medical service, and technical search and rescue. The standard also will apply to Emergency Service Organizations ("ESOs"), like local fire departments and third-party emergency medical services (referred to as "responders").

We have already identified at least a dozen concerning and/or potential very onerous elements in the proposal, including that it requires WEREs and ESOs to:

1. Develop a ***written Emergency Response Plan*** ("ERP") and ***evaluate it at least annually***.
2. Conduct ***facility vulnerability assessments*** to establish emergency response capabilities and match the facility's vulnerabilities with available resources. A facility vulnerability assessment is defined very broadly as a process of ***identifying, quantifying, and prioritizing the potential and known vulnerabilities of the entire facility, including the facility's structures and surrounding locations; inhabitants; infrastructure; materials, conditions, or processes; significant storage; critical infrastructure such as available water supply, electric power generation and transmission; and routine and emergency communication***. A facility's vulnerable areas are those most susceptible to emergencies or disasters that could severely impact the facility's operation, adversely affect the health and safety of employees, or cause potential damage to the environment. The assessment is intended to be a systematic evaluation of the facility to determine the impact that could be caused by potential emergency incidents, the severity of the impact, and the available or needed resources for mitigation.
3. Establish a process for ***team member and responder "participation"*** to: (i) involve team members and responders in ***developing and updating the ERP***; (ii) involve team members and responders in ***implementing and evaluating the ERP***, and in the review and change process; (iii) ***request input*** from team members and responders regarding modifications to the WEREs or ESOs own facilities; (iv) ***involve team members and responders in walkaround inspections, inspections conducted in response to a health or safety concern, and incident investigations;*** (v) encourage team members and responders to ***report concerns about safety and health and deficiencies in the ERP***; (vi) ***respond to reports*** in a reasonable period; and (vii) ***post procedures for reporting*** safety and health concerns in a conspicuous place.
4. Develop and implement a ***written comprehensive risk management plan*** *("RMP") and* ***review it at least annually,*** to ensure that ***all reasonably anticipated risks*** to emergency response team members have been evaluated and a control plan has been developed to ***mitigate the risks to a level that is as low as reasonably practicable***. It would have to at least ***cover training; risks associated with vehicle operations; operations at emergency incidents; non-emergency services and activities; and activities that lead to exposure to combustion products, carcinogens, and other incident-related health hazards***, and it would have to include ***evaluation of the likelihood of occurrence of a given hazard and the severity of its potential consequences; establishment of priorities for responsive actions; risk control techniques for mitigation of potential hazards; a plan for implementation of the most effective solutions; and a plan for post-incident evaluation of effectiveness of risk control techniques***.
5. Include special ***PPE Hazard Assessments***; ***Respiratory Protection Programs***; and ***Infection Control and Bloodborne Pathogens Programs*** for emergency response team members.
6. Create ***comprehensive WERE and ESO Medical Requirements***; e.g., ***a medical evaluation program*** for emergency response team members.
7. Provide ***Fitness for Duty Medical Evaluations*** by a physician or other licensed health care professional (PLHCP) for each emergency response team member ***at least every two years***, to detect any physical or medical condition(s) that could adversely affect the team member's ability to safely perform the essential job functions, which include: ***(i) medical and work history with emphasis on symptoms of cardiac and respiratory disease; (ii) physical examination with emphasis on the cardiac, respiratory, and musculoskeletal systems; (iii) spirometry; and (iv) an assessment of heart disease risk including blood pressure, cholesterol levels, and relevant heart disease risk factors***.

8. Establish and implement ***a process to evaluate and re-evaluate annually the physical ability/fitness of team members and responders to perform essential job functions***. OSHA explains, "*The fitness for duty evaluation confirms … that the team member or responder can physically perform the job functions required of them at emergency scenes. This requirement differs from being medically cleared to perform emergency response duties []. This requirement requires the WERE or ESO to determine if the team member or responder is physically capable to perform the duties required of them during an emergency response.*"
9. Provide*, at no cost to the team member,* ***behavioral health and wellness resources*** for emergency responders, which include, at minimum: ***(i) diagnostic assessment; (ii) short-term counseling; (iii) crisis intervention; and (iv) referral services for behavioral health and personal problems that could affect the team member's performance of emergency response duties***.
10. ***Facility and Vehicle Preparedness***, including: (i) ensuring the facility complies with Exit Routes and Emergency Planning requirements; (ii) providing facilities for decontamination, disinfection, cleaning, and storage of PPE and equipment; (iii) ensuring that fire detection, suppression, and alarm systems, and occupant notification systems are installed, tested, and maintained in accordance with manufacturer's instructions; (iv) ensuring compatibility of firefighting infrastructure if support will be accepted from mutual aid emergency responders; (v) identifying the location of firefighting equipment to ensure prompt access; and (vi) numerous requirements regarding vehicles, including: inspection, maintenance, and repair; training; and operational requirements.
11. Develop ***Pre-Incident Plans*** and ***review them annually or when conditions or hazards or change***. OSHA explains that "*PIPs typically include maps of the facility and diagrams and drawings, along with the designation of predetermined locations for emergency vehicle positioning during an incident.*" *PIPs should also* ***include locations of unusual hazards (e.g., storage and use of flammable liquids and gases, explosives, toxic and biological agents, radioactive sources, water-reactive substances, permit-required confined spaces, and hazardous processes)*** as well as ***locations of equipment for fire suppression systems, fire detection and alarm systems, and smoke control and evacuations systems***.
12. Implement an ***Incident Management System*** ("IMS") for managing and directing incident scene operations and activities.

Emergency Response Rulemaking Coalition

We expect many employers have a strong interest in having a seat at the table for this rulemaking. To that end, Conn Maciel Carey's national OSHA Practice is organizing a **fee-based organization-anonymous coalition of employers and trade groups to advocate for the most reasonable possible OSHA Emergency Response standard**.

Those of you who have participated in any of our recent OSHA rulemaking coalitions know that together we have had a very positive impact on OSHA rulemakings over the last several years. We have submitted comprehensive written comments into rulemaking records, testified at rulemaking hearings, and advocated directly to OSHA and OMB at formal and informal stakeholder meetings. Through those prior rulemaking coalitions, our input has resulted in direct changes to regulatory text, favorable decisions by OSHA about scope, coverage, exemptions, and substantive elements of regulations and standards.

We intend to follow a similar approach with this rulemaking, by coordinating with our coalition participants to:

- Keep coalition members informed about developments with the rulemaking on a regular and frequent basis;
- Solicit input about the direct and indirect burdens and costs associated with OSHA's proposed rule;
- Advocate for your interests through written comments, stakeholder meetings, and any other informal and formal opportunities to engage with decisionmakers at OSHA and OMB;
- Engage with OSHA as necessary post-issuance to steer guidance or further rulemaking in the right direction; and
- Educate coalition members about the rulemaking and a final regulation through regular email updates, virtual meetings, and/or webinars.

OSHA signaled that it will provide a 90-day comment period from when the NPRM is published in the Federal Register, which should be any day now. In light of the breadth and scope of the rule and the concerns we have already flagged we would like to determine interest in the coalition as soon as possible. We intend to schedule an **introductory meeting in mid-February to discuss the proposed rule and plans for the coalition. We will set a flat fee for participation that depends on the level of interest from trade associations and individual employers.**

Please let us know as soon as possible if you have any questions or if your organization may be interested in partnering with us to influence the OSHA Emergency Response rulemaking to ensure a workable final rule.