

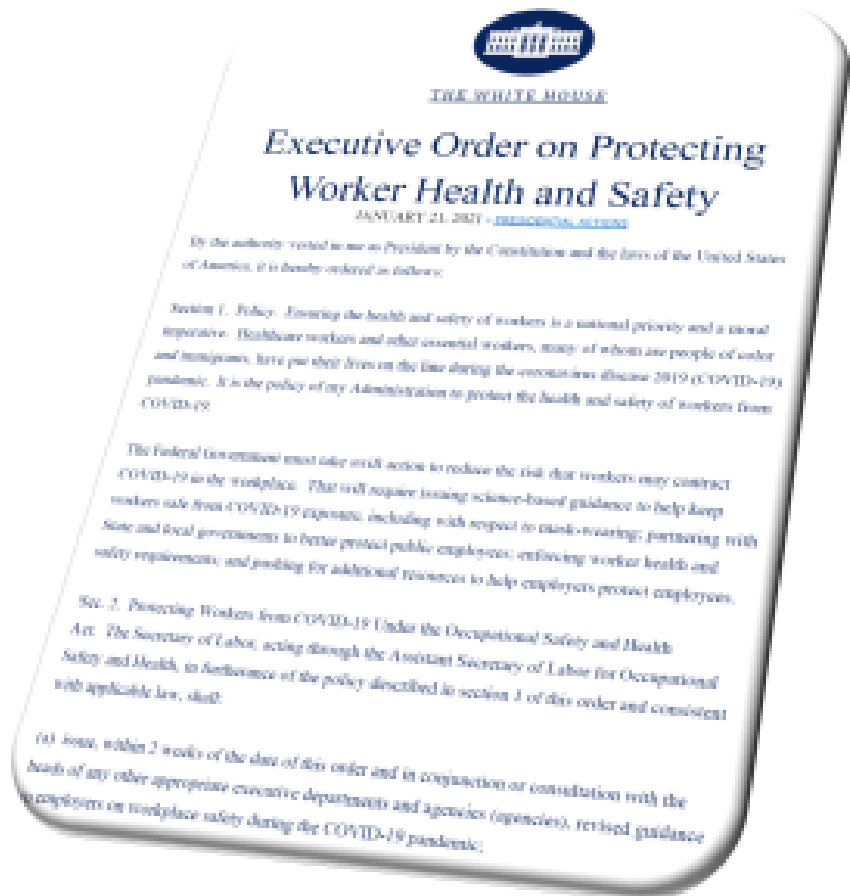
JANUARY 22, 2021 | OSHA RULEMAKINGS & STANDARDS

President Biden's Day 1 Executive Order regarding OSHA's Response to the COVID-19 Pandemic

By [Conn Maciel Carey's COVID-19 Task Force](#)

We did not have to wait long for the big update we have been holding our breath about – what the Biden Administration's plans will be for a federal COVID-19 emergency standard. As we expected, in just his first full day in Office (January 21, 2021), President Biden has already issued an Executive Order focused on OSHA's approach to managing the COVID-19 crisis in the workplace, but the answer about a federal COVID-19 ETS is not

as clear as we expected, or at least, the



In the Order entitled "[Executive Order on Protecting Worker Health and Safety](#)," President Biden has directed federal OSHA to revisit its overall strategy for regulating and enforcing issues associated with workplace spread of COVID-19 to execute his Administration's policy on worker safety:

"Ensuring the health and safety of workers is a national priority and a moral imperative. Healthcare workers and other essential workers, many of whom are people of color and immigrants, have put their lives on the line during the coronavirus disease 2019 (COVID-19) pandemic. It is the policy of my Administration to protect the health and safety of workers from COVID-19."

Specifically, President Biden has directed the Assistant Secretary of Labor for OSHA to take four key actions relative to COVID-19 in the workplace:

1. By February 4th, OSHA must consult with the heads of other appropriate executive departments and agencies and **update OSHA's COVID-19 guidance to employers on workplace safety during the COVID-19 pandemic** based on the best available scientific knowledge about virus;
2. Review OSHA's existing enforcement efforts and strategies related to COVID-19 to identify any short-, medium-, and long-term changes that should be made to better protect workers;

3. Regardless of the outcome of that enforcement review, the Order mandates that OSHA **launch a COVID-19 enforcement National Emphasis Program** to focus OSHA's enforcement resources on COVID-19 related violations and anti-retaliation protection; and
4. **"Consider whether an emergency temporary standard on COVID-19, including with respect to masks in the workplace, is necessary...."**

Our expectation has been that this early Executive Order would dictate to OSHA that it must issue an ETS, rather than just to consider whether one is needed. Perhaps this is just a formality, and the answer is preordained, but for the moment, a federal COVID-19 ETS is not a guarantee.

If (and we assume when) OSHA determines that an ETS is needed, the Executive Order does set a deadline by when OSHA must finalize and issue the rule – March 15, 2021.

Also as we expected, the Order instructs OSHA that if it adopts a federal emergency rule, it must also ensure that the 20+ federal OSHA approved State OSHA agencies also do so: "ensure that workers covered by such plans are adequately protected from COVID-19, consistent with any revised guidance or emergency temporary standards issued by OSHA"

We will continue to track developments at OSHA under the new Biden Administration, and will share with you when we see the Directive for the new COVID-19 National Emphasis Program, any material changes to COVID-19 guidance from OSHA, and progress towards a federal COVID-19 emergency temporary standard. We still believe there is a greater than 90% chance federal OSHA will issue such a rule, and now we know that the target deadline for that is March 15th.

Would a Fed OSHA COVID-19 ETS preempt or nullify the various, inconsistent State Plan emergency rules that already exist?

A Fed OSHA COVID emergency (or permanent) regulation would NOT by law *preempt* emergency rules promulgated by approved State OSH Plans like Cal/OSHA or VOSH. However, because the OSH Act requires State Plan enforcement to be "at least as effective as" Fed OSHA's, where a Fed OSHA regulation about a specific hazard, like COVID-19, conflicts with a state plan's corollary rule, and the Fed OSHA rule is *more* stringent, the state plan would be required to beef up its rule. However, where the State Plan's rule is already more burdensome than the new Fed OSHA rule, the state plan would not be required to change/soften its rule.

What is most likely to happen, as the Executive Order already signaled, is that Fed OSHA will include in its ETS a requirement for all state plans to adopt a rule that is at least as effective as the Fed OSHA rule. That will mean that a state like California, that already has a rule that is likely more rigorous than what Fed OSHA will adopt, will not be required to do anything different, but state plan states that have not adopted an ETS (like Maryland and North Carolina), or states that adopted a rule that may be less stringent than what Fed OSHA issues (perhaps like VOSH, depending on what the Fed OSHA rule looks like), would be required to adopt an identical or more stringent rule by some deadline that OSHA sets in the Fed ETS.

It is possible that Fed OSHA could include in its ETS a mandate that all state plans adopt an identical or substantially similar rule, which would require states that have a more onerous set of requirements to pare those rules back to align with the Fed OSHA rule. Although that would be ideal because the inconsistent approach

around the country we have been experiencing throughout the pandemic has presented enormous challenges for national employers, it is not very likely. The only OSHA regulation that requires all states to regulate exactly the same as Fed OSHA is injury and illness recordkeeping, and it is hard to see the Biden Administration intervening to require a state plan to provide lesser protection.

At the end of the day, we do not see the problematic Cal/OSHA rule going away based on what Fed OSHA does. We still hold out hope that through the Advisory Committee Process in California, we can fix some of the more onerous provisions of that rule, and the framework of a (hopefully) less onerous Fed OSHA ETS would be a useful point to make in advocating for those changes in California.

For additional resources on issues related to COVID-19, please visit Conn Maciel Carey's [COVID-19 Resource Page](#) for an [extensive index of frequently asked questions](#) with our answers about HR, employment law, and OSHA regulatory developments and guidance, as well as COVID-19 recordkeeping and reporting flow charts. Likewise, subscribe to our [Employer Defense Report](#) blog and [OSHA Defense Report](#) blog for regular updates about the Labor and Employment Law or OSHA implications of COVID-19 in the workplace. Conn Maciel Carey's COVID-19 Task Force is monitoring federal, state, and local developments closely and is continuously updating these blogs and the FAQ page with the latest news and resources for employers.

