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Update on OSHA's Emergency Response Rulemaking

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On February 5, 2024, OSHA revealed its Notice of Proposed Rulemaking for a new Emergency Response Standard, initiating a public comment period. As we previously reported, 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.

Although OSHA extended the deadline by which comments must be filed from May 6 to June 21, that day is approaching fast, especially given the length, technical nature, and complexity of the proposed rule. To that end, we are writing to re-gauge your organization's interest in participating in a coalition of employers and trade associations to work on this OSHA rulemaking with us.

Background About OSHA's Emergency Response Rulemaking

Per OSHA, the proposed Emergency Response Standard is meant to replace the existing Fire Brigades Standard and will update safety and health protections in line with national consensus standards for a broad range of workers exposed to hazards that arise during emergencies. While the number of requirements will significantly increase, so too would the scope of the standard. Particularly, the existing Fire Brigades Standard would be substantially expanded to apply to private employers engaged in industries such as manufacturing, processing, and warehousing that have, or establish, workplace emergency response teams, covering not only firefighting, but also emergency medical services, technical search and rescue, and other emergency response activities. It would also cover public employers, like municipal fire departments and third-party emergency medical services. Employees who engage in emergency response activities, either as a primary or collateral duty to their regular daily work assignments, would be covered by the standard.

We have already identified numerous concerning and/or potential very onerous elements in the proposal:

1. The scope of the proposed rule is unclear.
2. It is unclear how the proposed rule would coexist with existing OSHA standards related to emergency response, which would make it exceedingly difficult for employers to know how to comply.
3. Many of the proposed rule requirements are duplicative of other OSHA requirements or requirements of other government agencies, including the EPA's RMP.

4. OSHA's heavy reliance on NFPA standards, 22+ of which are incorporated by reference (i.e., making their approximately 15,000 mandatory statements enforceable by law), is problematic for numerous reasons (e.g., legal, economic feasibility, compliance, etc.).
5. Private employers with employees who respond to emergencies as a primary duty should not be treated like public employers (e.g., municipal fire departments), and thus, should not be subject to the same heighted compliance requirements as public employers.
6. The impact of the proposed rule on both private emergency response teams and volunteer organizations is concerning, as both may decide or be forced to shutter, leaving the safety of the nation in peril.
7. The proposed rule's provision regarding exposure to combustion products is unclear and problematic.
8. The proposed rule includes unrealistic and/or impractical requirements related to emergency incident operations, such as marking control zones, staffing, etc.
9. OSHA should not include requirements related to workplace violence prevention in the final rule.
10. Perhaps most concerning of all, the administrative burden imposed by the proposed rule would be extraordinary. See the table below for a partial list of required elements and associated review cycles:

Emergency Response Program (ERP)	• Evaluate the effectiveness of the ERP at least ***annually***, and ***upon discovering deficiencies***, and document when the evaluation(s) are conducted. • The ERP would be ***revised as required written plans and procedures (except PIPs) are updated***.
Risk Management Plan (RMP)	Review the RMP ***when review is required by [the Post-Incident Analysis or ERP provisions]***, but ***not less than annually***, and update it as needed.
Medical Evaluation	Repeat ***biennially (every two years)*** unless the PLHCP deems more frequent evaluations are necessary with the exception of spirometry which will be repeated when deemed appropriate by the PLHC.
Behavioral Health and Wellness	Inform each team member and responder, on a ***regular and recurring basis***, and ***following each potentially traumatic event***, of the resources available.
Fitness for Duty	Establish and implement a process to evaluate and reevaluate ***annually*** the ability of team members and responders to perform essential job functions.
Training	• Provide initial training, ***ongoing*** training, ***refresher*** training. • Provide ***annual*** skills checks to ensure each team member and responder maintains proficiency.
Pre-Incident Plans (PIP)	• Review ***annually*** and, for WEREs, ***when conditions or hazards change at the facility.*** • Update as needed.
Post-Incident Analysis (PIA)	• ***Promptly*** conduct a PIA to determine the effectiveness of the response to an incident ***after a significant event.*** • Review and evaluate the RMP, IMS, PIPs, SOPs, and IAPs for accuracy and adequacy. • ***Promptly*** identify and implement changes needed to the RMP, IMS, PIPs, IAPs, and SOPs based on the PIA lessons learned; or if the changes cannot be promptly implemented, develop a written timeline for implementation ***as soon as feasible.***

Employers Emergency Response Rulemaking Coalition

We have been organizing and working with a coalition of employers and trade associations that have a strong interest in having a seat at the table for this rulemaking. The coalition includes numerous employers and trade associations in various industries, with establishments and employees across the country. To that end, Conn Maciel Carey's national OSHA Practice reinvites you to join our **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 the official rulemaking records, testified at rulemaking hearings, and advocated directly to

OSHA and to the White House 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.

Please let us know ASAP if your organization may be interested in participating in the Coalition. We look forward to partnering with Industry to influence the OSHA Emergency Response rulemaking to ensure a workable and reasonable final rule.