

# OSHA - What Happened in 2022 and What to Expect in 2023

Alert

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In 2022, health and safety agencies' focus continued to shift away from the near-constant COVID-related discussions of the past few years. COVID-19 is not in the rearview mirror, but the Biden Administration's comprehensive occupational health and safety priorities came into view in 2022, and will continue to come into focus in 2023. As the calendar turns into January 2023, our attorneys are recapping what happened and describing what lies ahead.

## What Happened – 2022 Year-in-Review

The Occupational Health and Safety Administration (OSHA) started 2022 with a [Supreme Court loss](#) over its COVID-19 Emergency Temporary Standard, which the [U.S. Secretary of Labor Marty Walsh](#) called "a major setback to the health and safety of workers across the country." It ended the year with the issuance of the Bureau of Labor Statistics (BLS) [2021 Census of Fatal Occupational Injuries](#) and a commitment to do more.

On December 16, 2022, OSHA's Assistant Secretary issued a statement noting that the BLS identified a one-year increase of nearly 9 percent in fatal work injuries — the highest annual rate since 2016. Per the statement, OSHA interprets this data as a call to action to make workplaces safer. The statement also called out the disproportionate fatality rates of Black and Latino workers. Transportation-related events were the highest cause of worker fatalities, and employees in the transportation and moving material and construction occupations had the highest number of fatalities. The census also identified significant increases in fatalities and injuries from exposure to harmful substances.

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The bookends of the year show OSHA's shift from all things COVID back to the basics of complying with existing standards and promulgating new standards to strengthen workplace safety. Some specific observations our team had in 2022 are described below.

## ENFORCEMENT

The official fiscal year 2022 enforcement numbers have not yet been released, but our attorneys found increased enforcement from 2021 to 2022. [Maximum penalties](#) increased in 2022 and are now \$14,502 per violation for serious and other-than-serious citations, and \$145,027 per violation for willful or repeat violations. In 2022, OSHA issued citations with initial penalties of more than \$1 million to at least six companies, and issued initial penalties upward of \$500,000 to another 20 employers. Both the penalties themselves and the number of citations with significant initial penalties mark an increase from prior years.

According to OSHA's FY 2022 Top 10 Most Frequently Cited Standards list, the most cited standards were: fall protection and associated training, the Hazard Communication Standard, Respiratory Protection Program, ladders (construction industry), scaffolding (construction), control of hazardous energy, powered industrial trucks, eye and face protection, and guarding. Most of these standards on the list are repeat-offenders (fall protection has topped the list for more than a decade) rather than because they are OSHA priorities. Employers should continue to evaluate their compliance with commonly cited standards to avoid being part of the dataset for FY 2023.

## COVID-19

OSHA's last update of its COVID guidance was in August 2021. An "Update Coming Soon" banner has been on the website for almost a year leaving employers confused about OSHA's approach to COVID-19. However, in 2022, OSHA continued its [National Emphasis Program](#), focusing inspections and enforcement on employers in high-hazard industries. With that, COVID-related enforcement continued, although at a slower pace than 2021 with approximately 300 citations involving COVID-related violations brought by OSHA in 2022. COVID-related complaints remained primarily in the health care sector, with nearly half of all federal OSHA complaints relating to health care. The retail trade sector and restaurant sectors were next in terms of total complaints.

## SEVERE VIOLATOR ENFORCEMENT PROGRAM

In September 2022, OSHA updated its [Severe Violator Enforcement Program](#) (SVEP) and significantly expanded the scope of the SVEP, looping in additional industries and lowering the bar for consideration of SVEP status. Per the SVEP, OSHA should focus its inspections on "employers that have demonstrated a recalcitrance or indifference to their OSH Act obligations by committing willful, repeated, or failure-to-abate violations of OSHA requirements." Employers may not be aware they are in the SVEP until a citation is issued, but cases are eligible for SVEP status if: (1) fatality/catastrophe with at least one willful or

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repeated violation or failure to abate notices; (2) non-fatality/catastrophe with at least two willful or repeated violations or failure to abate notices; or (3) the action is egregious. Employers in SVEP status are subject to a mandatory follow up inspection within two years, news releases, increased penalties, and the potential for company-wide inspections.

Employers in SVEP status will generally be removed three years after abatement verification is submitted. The SVEP was final upon issuance and is now being implemented.

## What's Next – 2023 Issues

As described above, the BLS Census was issued in December and identified increases in worker fatalities, with increases in transportation-related events, and the highest injury/illness and fatality data in the transportation and material and construction occupations. While not a crystal ball of the agency, the Census serves as an important bellwether of OSHA's priorities, whether through enforcement or rulemaking.

Last week the Administration (finally) issued its [Fall 2022 Regulatory Agenda](#), which has almost 30 OSHA actions in the hopper for 2023. Many of these actions align with the Census findings and the 2022 Top 10 Most Cited list, but other actions are first-time standards. More actions may be added in the spring iteration of the Regulatory Agenda. Some of the major anticipated actions are described below.

## COVID-19 AND INFECTIOUS DISEASE STANDARD(S)\*

OSHA's permanent COVID-19 standard for the healthcare sector is [under review](#) by the Office of Management and Budget and is expected to be issued in early 2023. A permanent standard is expected to be similar to the Emergency Temporary Standard issued in late 2021, but OSHA solicited comments on a number of potential changes including flexibility for employers, exemptions, coverage of construction activities in healthcare settings, reporting and recordkeeping, and alignment with CDC recommendations, among others.

OSHA also has a broader-ranging infectious disease standard identified in the [Regulatory Agenda](#). In this standard, OSHA is expected to address existing infectious diseases (TB, varicella, measles, etc.) as well as new and emergency diseases (COVID, flu) in healthcare and other high-risk environments. A proposed rule is slated for Fall 2023.

## E-SUBMITTAL OF OSHA 300 LOGS

In March 2022, OSHA [proposed](#) a revision expanding its recordkeeping and reporting standard. Specifically, OSHA proposed that employers with 100 or more employees in certain industries must electronically submit injury and illness information (Forms 300, 301 and 300A) annually. This would increase the number of establishments that electronically submit information to OSHA. Currently, two

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categories of establishments submit records electronically: (1) establishments with 250 or more employees in certain industries; and (2) establishments with 20 to 249 employees in one of the 60+ [Appendix A](#) industries. However, even those establishments are only required to submit their Form 300As.

If the proposed rule is finalized as-is, it will expand the number of establishments electronically submitting information as well as the type of information that must be submitted. OSHA is expected to finalize this rule in [March 2023](#). Until finalized, employers should continue under the existing rule.

## WORKPLACE VIOLENCE STANDARD

Workplace violence was identified as an issue in the Census and an action that OSHA identified in the Regulatory Agenda at pre-rule stage. In July 2016, the National Nurses United petitioned OSHA for a federal workplace violence standard. OSHA issued a Request for Information in December 2016, and President Obama's Assistant Secretary of Labor granted the National Nurses United petition on his last day in office.

There is currently no OSHA standard related to workplace violence, and no rulemaking has commenced since grant of the National Nurses United petition. In its Regulatory Agenda, OSHA [states](#): "workplace violence is a widespread problem, and there is growing recognition that workers in healthcare and social service occupations face unique risks and challenges." OSHA's determination on the path forward is anticipated in 2023.

## HEAT STANDARD

In [2021](#), OSHA issued a [Memo](#) establishing an enforcement initiative to prevent and protect employees from heat-related illnesses and deaths while working in hot environments. OSHA identified the potential for serious heat-related illnesses when body temperature exceeds 100.4 degrees Fahrenheit, and fatal heat-related cases when the body temperature reaches 104 degrees Fahrenheit. OSHA issued an [Advance Notice of Proposed Rulemaking](#) focused on heat-related illnesses in October 2021. In 2022, OSHA kept the momentum going by issuing a [National Emphasis Program](#) expanding its heat-illness prevention campaign.

A formalized heat standard has been one of the most hotly awaited OSHA standards, though the [Regulatory Agenda](#) suggests a standard may not be issued in 2023 as OSHA continues to work through the Small Business Regulatory Enforcement Fairness Act process. However, even before a standard is promulgated, because of the National Emphasis Program and OSHA's suggestion that it can already enforce heat-related issues through its General Duty Clause, employers should consider their own [heat illness prevention plans](#). In addition, while the Regulatory Agenda suggests OSHA is looking toward a 2024 standard, that process may speed up as 2022 data is gathered. OSHA states, "climate change is increasing the heat hazard throughout the nation: 2020 was either the hottest or the second hottest year on record, with 2021 being the 6th hottest on record. Although official figures for 2022 are not yet available, we already know that in

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many states heat related deaths are far higher than normal this year.”

## PROCESS SAFETY MANAGEMENT\*

OSHA has been attempting to make revisions to its Process Safety Management program regulations for almost a decade. In the most recent [Regulatory Agenda](#), OSHA indicates it will spend this year analyzing comments from prior requests for information and a stakeholder meeting held in October 2022. At that time, OSHA identified [potential changes](#) to the PSM standard including:

- Clarifying the exemption for atmospheric storage tanks
- Expanding the scope to include oil- and gas-well drilling and servicing and resuming enforcement for oil and gas production facilities
- Expanding PSM coverage and requirements for reactive chemical hazards
- Updating and expanding the list of highly hazardous chemicals in Appendix A
- Extending PSM requirements to cover dismantling and disposal of explosives and pyrotechnics
- Clarifying the scope of the retail facilities exemption
- Defining the limits of a PSM-covered process

It is possible OSHA finalizes proposed revisions this year, though it's more likely OSHA waits for the Environmental Protection Agency to revise its own Risk Management Program regulations, which are currently slated to be complete in [August 2023](#). In either case, PSM revisions are coming, and PSM-covered facilities understand the meticulousness of this regulatory regime.

## EMERGENCY RESPONSE\*

For a decade, OSHA has sought to develop a comprehensive emergency response standard aimed at protecting workers who respond to emergencies as part of their regular duties (compared to the discrete standards promulgated for fire brigades, as example). OSHA has conducted stakeholder meetings and convened a Small Business Regulatory Enforcement Fairness Act panel, and the scope of a standard is likely to also include workers who may be called upon from time to time to respond to emergencies. If that is the case, the standard could be widely applicable across industries. The [Regulatory Agenda](#) identifies a Fall 2023 proposed rule.

## OTHER POTENTIALLY SIGNIFICANT STANDARDS

In addition to the widely applicable topics identified above, OSHA has a variety of more discrete but still significant standards proposed for promulgation or revision, including to a number of last year's Top 10 cited standards:

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- [Lock-out/tag-out](#) (proposed rule expected July 2023)
- [Walking-working surfaces](#) (revised proposed rule/re-open rulemaking period expected May 2023)
- [Cranes and derricks](#) (proposed rule expected June 2023)
- [Welding in confined spaces](#) (proposed rule expected in February 2023)
- [Tree care](#) (proposed rule expected in May 2023)
- [PPE in the construction industry](#) (proposed rule expected soon)
- [Communication tower safety](#) (proposed rule expected March 2023)

OSHA can take many months to finalize and implement a proposed rule. Although implementation may not be imminent, contacting your Stinson attorney can help lay the groundwork for future changes, when necessary.

\*Identified in the Regulatory Agenda as being an economically significant action.

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