

# Occupational Health & Safety 2022





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# GLOBAL REACH

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# United States

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## LEGAL FRAMEWORK

### Legislation

- 1 | What legislation governs occupational health and safety in your jurisdiction? Are there any notable sector-specific laws or exclusions from the primary legislation?

The Occupational Safety and Health Act of 1970 (the OSH Act) established the Occupational Safety and Health Administration (OSHA), a regulatory and enforcement agency that promulgates and enforces workplace health and safety standards. However, the OSH Act allows states and territories to submit a state plan to OSHA for approval, whereby the responsibility to enact and enforce workplace health and safety standards within that jurisdiction passes to a state agency. More than half of the states in the United States have an OSHA-approved state plan, while the remaining states are administered by OSHA directly.

Also, the Federal Mine Safety and Health Act of 1977 established the Mine Safety and Health Administration, which enforces health and safety standards to all mining and mineral processing operations in the United States.

Additionally, the Fair Labor Standards Act of 1938 contains rules concerned with the employment of young workers, such as minimum age restrictions for employment, restrictions on the times of day youth may work and the jobs they may perform.

### Regulations

- 2 | How are regulations relating to occupational health and safety generally issued in your jurisdiction? What compliance obligations do these regulations generally impose on employers?

Under the OSH Act, when the Secretary of Labor (the Secretary) determines that a rule promulgating, modifying, or revoking an occupational health and safety standard is necessary, the Secretary may request the recommendations of an advisory committee. The advisory committee must submit its recommendations within 90 days or a longer or shorter period set by the Secretary, but never longer than 270 days. The Secretary will often decide on its own what regulations to promulgate based on policy priorities of the Departmental leadership. The Secretary has the authority to issue regulations for the general, maritime and construction industries.

The Secretary must publish a proposed rule in the Federal Register and allow stakeholders or interested persons at least 30 days (and often 60 or 90 days) after publication to submit written data, comments, objections and a request for a public hearing. Hearings are more typically utilised in the rulemaking process for health standards and other more complex standards. If a hearing is requested, the Secretary must publish a notice specifying a time and place for a public hearing in the Federal

Register within 30 days after the last day of the public comments period. Within 60 days after the last day of the public comments period or, if a hearing was held, within 60 days after the public hearing, the Secretary must issue the rule.

Section 5 of the OSH Act requires that employers comply with all occupational health and safety standards promulgated under the Act.

### Applicable employers and workers

- 3 | Which employers and workers are subject to the occupational health and safety regime? Are there any notable exclusions?

Which employers and workers are subject to the occupational health and safety regime? Are there any notable exclusions? (For example, are public employers subject to the primary legislation? Are independent contractors, home workers and other off-site workers covered?)

Section 5 of the OSH Act requires that employers:

- provide employees with a place of employment free from recognised hazards that cause or are likely to cause death or serious physical harm; and
- comply with all occupational health and safety standards promulgated under the Act.

The term 'employer' means a person engaged in a business affecting commerce who has employees but does not include the United States (excluding the United States Postal Service) or any state or political subdivision of a state. The term 'employee' means an employee of an employer who is employed in a business of his or her employer that affects commerce.

Additionally, section 19 of the OSH Act makes the heads of each federal agency responsible for establishing and maintaining an effective and comprehensive occupational health and safety programme that is consistent with standards promulgated under the Act.

State and local government workers are not covered by the OSH Act, but they may have occupational health and safety protections if they are located in a state with a state plan approved by OSHA that covers public-sector workers. The OSH Act allows states and territories to submit a state plan to OSHA for approval, whereby the responsibility to enact and enforce workplace health and safety standards within that jurisdiction passes to a state agency. More than half of the states in the United States have an OSHA-approved state plan.

Those specifically not covered under the OSH Act are the self-employed, immediate family members of farm employers and workplace hazards regulated by another federal agency (eg, the Mine Safety and Health Administration).

**Applicable risks**

4 | Which health and safety risks are covered under the relevant legislation?

Section 5 of the OSH Act requires that employers:

- provide employees with a place of employment free from recognised hazards that cause or are likely to cause death or serious physical harm; and
- comply with all occupational health and safety standards promulgated under the Act.

‘Serious physical harm’ means that a part of the body is damaged so severely that it cannot be used or cannot be used very well.

Additionally, federal regulations require employers to report work-related deaths, amputations, eye loss or injuries resulting in in-patient hospitalisation to OSHA. OSHA defines ‘in-patient hospitalisation’ as a formal admission to the in-patient service of a hospital or clinic for care or treatment.

**Authorities**

5 | What government authorities are charged with the enforcement and administration of the occupational health and safety regime in your jurisdiction? What is the extent of their activities and powers?

The OSH Act created OSHA, which is administered by and through the Department of Labor. Section 8 of the OSH Act grants the Secretary the power to enter places of employment to perform inspections and investigations. Section 9 of the OSH Act grants the Secretary the power to issue citations if, upon inspection or investigation, the Secretary or his or her authorised representatives believe that an employer has violated a requirement under the OSH Act or an occupational health and safety standard promulgated under the Act. Section 17 of the OSH Act grants the Secretary the power to assess civil penalties for violations.

**Soft law and guidance**

6 | Has the government issued any guidance or codes of practice relating to occupational health and safety in your jurisdiction? What force do these have and how are they implemented in practice?

OSHA has issued a vast body of guidance materials related to specific occupational health and safety issues, industry specific issues or issues related to OSHA’s occupational health and safety standards. These guidance materials are available on OSHA’s website. Where there is OSHA guidance on a topic but no specific standard on a point, OSHA can enforce the guidance with a General Duty Clause violation.

Section 5 of OSH Act, also known as the General Duty Clause, requires that employers provide employees with a place of employment free from recognised hazards that causing or are likely to cause death or serious physical harm (‘serious physical harm’ means that a part of the body is damaged so severely that it cannot be used or cannot be used very well). If an employer fails to comply with OSHA guidance and this failure results in workplace hazards that are causing or is likely to cause death or serious physical harm, then OSHA may issue a citation to the employer and assess civil penalties for a violation of the General Duty Clause.

**EMPLOYER DUTIES AND RESPONSIBILITIES**

**Primary duty**

7 | What is the nature and extent of the employer’s primary duty to protect workers’ health and safety under the relevant legislation? How is this duty observed and interpreted in practice?

Under the Occupational Safety and Health Act of 1970 (the OSH Act), Employers must provide a safe and healthy workplace for their employees. This includes preventing serious recognised hazards, providing adequate safety training and maintaining records of work-related injuries and illnesses, among other requirements. In practice, this means that employers must monitor their operations, periodically inspect for safety hazards, communicate with their employees about potential hazards and correct hazards that they identify. Employer obligations also include day-to-day considerations, like ensuring that employees have the appropriate equipment and making sure that all such equipment is properly maintained. Employers also are required to maintain employee injury logs, which they must provide to the Occupational Safety and Health Administration (OSHA) upon request.

**Third parties**

8 | Does the employer owe a duty to protect the health and safety of third parties? If so, what is the nature and extent of this duty?

As a general matter, OSHA focuses on the employer’s duty to protect its own employees, although it is now more common for one employer to be cited for hazards to which another employer’s employees were exposed. This is due to OSHA’s application of the ‘multi-employer worksite doctrine’, where different employers on a worksite can be cited for the same hazard, either as a ‘controlling’, ‘exposing’, ‘creating’ or ‘correcting’ employer. OSHA enforcement does not extend to non-workers (like customers), who are protected by other laws and an overall duty of care.

**Work premises**

9 | What is the nature and extent of the employer’s duty to ensure safe work premises?

Employers have a responsibility to their employees under the General Duty Clause (section 5 (a)(1) of the OSH Act) to provide a workplace that is ‘free from recognised hazards that are causing or are likely to cause death or serious physical harm’. Employers must also comply with hazard-specific standards in the workplace as well as any applicable OSHA health and safety regulations. Requirements also typically apply to the work environment, which includes both the workplace and other places where employees are either conducting work activities or at which they are present for work-related purposes. Generally speaking, OSHA recommends that all workplaces have at least one employee trained in first aid and cardiopulmonary resuscitation, but this is not required. OSHA also has industry specific requirements for first aid. All employers are required to provide sanitary and immediately available restrooms, among other sanitation standards.

**Plant and equipment**

10 | What are the employer’s duties and responsibilities regarding the provision of safe plant and equipment?

As part of their General Duty Clause obligation, US employers not only have a duty to provide employees with safe equipment, but also have a duty to ensure that all tools and equipment are safely and properly

maintained. Further, OSHA has issued many regulations that impose requirements on employers on how to maintain and operate certain types of machinery and equipment. These duties and responsibilities will vary depending on what type of machinery and equipment is located at the worksite.

### Work systems, training and supervision

11 | What are the employer's duties and responsibilities regarding the provision of safe work systems and adequate training and supervision?

Employers have several training obligations under OSHA depending on the type of workplace, type of operations and equipment present, among other factors. Generally speaking, employers must provide safety training in a way that employees can understand, including in a language that employees can understand. Employees with supervisory responsibilities also have specific obligations and are required to, 'to the extent of their authority, furnish employees employment and a place of employment that are free from recognised hazards that are causing or are likely to cause death or serious physical harm'. Employers may also have training requirements that vary by industry and task, for example, such as requirements regarding personal protective equipment, lock-out/tag-out (control of hazardous energy), and forklifts, just to use several examples.

### Accident response and reporting

12 | What rules and requirements govern employers' response to and reporting of workplace accidents?

Employers in the United States have obligations to prepare OSHA forms regarding certain types of workplace illnesses and injuries. Employers must keep records of serious work-related illnesses and injuries that satisfy different criteria under the OSHA recordkeeping regulations. Under this set of regulations, employers must also post annual summaries of the OSHA recordkeeping logs as well as allow certain individuals access to these logs. Minor illnesses only requiring first aid do not need to be recorded. Recorded information must be submitted to OSHA, if required, typically that occurs during an OSHA inspection. OSHA does not require reporting of near misses or close calls (defined as incidents in which an employee may have been hurt under slightly different circumstances) but does strongly encourage employers to investigate them.

Significantly, employers are required to immediately report directly to OSHA employees' deaths (within eight hours) and promptly report work-related hospitalisations, amputations or eye loss (within 24 hours).

### Risk assessments

13 | What rules, requirements, procedures and best practices should employers be aware of when conducting occupational risk and hazard assessments?

The hazard assessment regulations can be found at 29 CFR 1910.132(d) et seq. OSHA suggests:

- collecting information regarding any hazards;
- routinely conducting inspections to identify hazards;
- identifying any health hazards (as opposed to physical hazards);
- completing investigations into any incidents;
- identifying hazards related to emergent or otherwise nonroutine or infrequent situations and characterising the nature of all hazards identified;
- determining interim control measures; and
- prioritising hazards to be addressed.

### Disclosure and reporting requirements

14 | Are employers required to submit regular health and safety reports to the relevant authorities? If so, what is the nature and extent of this requirement?

Employers have several obligations regarding workplace illness and injury recordkeeping and reporting. Many employers must keep records of serious work-related illness and injury and must also post and allow certain individuals access to these logs. Minor illnesses only requiring first aid do not need to be recorded. Also, employers are obliged to report to OSHA employee deaths and serious work-related injuries or illnesses within certain time frames.

### Provision of information to workers

15 | What requirements apply regarding the provision of health and safety information to workers?

Certain information regarding workplace injuries and illnesses must be posted in the workplace, and employees and former employees must also be provided access to some of this information. Various other requirements apply to employers as well, including using signage to warn of potential hazards and posting the OSHA poster and any OSHA citations. Employers must also provide adequate training programmes and must, for example, communicate information regarding the identity of and any hazards associated with workplace chemicals.

### Insurance requirements

16 | What insurance must employers carry to cover liability for occupational health and safety risks?

There is no general requirement under the OSH Act for employers to purchase insurance coverage for occupational health and safety risks. That said, most (if not all) states in the United States do require employers to purchase workers' compensation insurance to cover liability for occupational health and safety risks (and to provide benefits to injured employees due to work-related injuries or illnesses).

### Other duties and responsibilities

17 | Are employers subject to any other notable health and safety duties and responsibilities in your jurisdiction?

Employers should also stay abreast of the requirements related to covid-19 safety and exposure in the workplace, as the guidance and recommendations by OSHA and other federal agencies changes frequently.

## WORKER DUTIES, RIGHTS AND RESPONSIBILITIES

### Primary duty

18 | What is the nature and extent of a worker's duty to protect their own and others' health and safety under the relevant legislation and regulatory framework?

Employees must comply with all relevant OSH Act requirements. In particular, employees also must use personal protective equipment, safety equipment and other equipment or procedures as directed by the Occupational Safety and Health Administration (OSHA) for their protection.

## Consultation and collaboration with employers

19 | Are workers in your jurisdiction entitled or required to consult and collaborate with their employer in relation to the development and implementation of health and safety measures and policies?

Employers have the discretion to decide to consult with employees or their authorised representatives for the development and implementation of health and safety policies. There are a limited number of OSHA regulations that require employers to consult with their employees or authorised representatives, most recently with the OSHA Emergency Temporary Standard for covid-19 to covered healthcare-related employers.

## Trade unions

20 | What role do trade unions play in protecting occupational health and safety in your jurisdiction?

Labour unions who are the authorised collective bargaining representatives of employees at US worksites can play a role in workplace safety, but that is typically governed by the specific terms of the collective bargaining union elected by their employees at a particular worksite. As such, the role of the union will vary from worksite to worksite, but examples of areas where the union can play a role include training, serving on a joint management-labour safety committee, providing input to employer health and safety policies, as well as participating in OSHA inspections. OSHA will also seek the input of an authorised union as part of any settlement negotiation with an employer.

## Whistle-blowing

21 | Are workers afforded any legal protections against reprisals for whistle-blowing in relation to occupational health and safety risks?

Yes, under several statutes, employees have rights protected against retaliation for asserting health and safety related complaints. Most of these statutes are enforced by OSHA, which as a department focus on investigating and enforcing whistle-blower complaints under federal laws that protect employees from retaliation for reporting workplace hazards or violations.

## Right to refuse work

22 | Do workers have the right to refuse work or seek reassignment in hazardous situations?

Yes, under certain conditions. Employees have the right to refuse to work in specific circumstances, including when the workplace clearly presents a risk of imminent danger of physical harm or death.

## HAZARDS AND RISKS

### Hazardous substances and chemicals

23 | What occupational health and safety rules govern the handling and use of hazardous substances and chemicals? What are the practical implications of these rules?

The Occupational Safety and Health Administration's (OSHA) regulation subpart H covers 'Hazardous Materials'. Each standard thereunder contains rules and regulations for different types of hazardous materials, and some standards apply to specific substances. Specific standards apply to the following substances:

- compressed gases;
- acetylene, hydrogen;

- oxygen;
- nitrous oxide;
- flammable liquids;
- spray finishing using flammable and combustible materials;
- explosives and blasting agents;
- liquefied petroleum gases; and
- anhydrous ammonia.

Employers using these substances should be sure to comply with the additional requirements listed in the corresponding standard.

Also, the 'Process Safety Management of Highly Hazardous Chemicals' requires that employers develop a written plan and procedures for handling highly hazardous substances in the workplace. Employers must also provide information and training to their employees. The employer is required to perform inspection and testing on any process equipment related to the use of these substances.

The 'Hazardous Waste Operations and Emergency Response' standard imposes requirements for operations involving hazardous waste that are conducted at treatment, storage, disposal facilities and clean-up operations at uncontrolled hazardous waste sites.

Additionally, there are specific standards that apply to dipping and coating operations involving a dip tank containing a liquid other than water.

Also, subpart Z covers 'Toxic and Hazardous Substances'. Several standards apply directly to the handling of specific toxic chemicals and materials. OSHA has a specific standard for the following toxic substances:

- air contaminants;
- asbestos;
- coal tar pitch volatiles;
- several carcinogens;
- inorganic arsenic;
- lead;
- chromium (VI);
- cadmium;
- benzene;
- coke oven emissions;
- bloodborne pathogens;
- cotton dust;
- 1,2-dibromo-3-chloropropane;
- acrylonitrile;
- ethylene oxide;
- formaldehyde;
- methylenedianiline;
- 1,3-butadiene;
- methylene chloride;
- respirable crystalline silica; and
- ionising radiation.

Notably, OSHA's lead standard requires that employers maintain the earnings, seniority and other employment rights and benefits for employees who miss work due to work-related lead exposure.

Section 1200 of that subpart contains the 'Hazard Communication' standard. This standard contains several rules regarding communicating the presence and risks associated with toxic substances present in the workplace. Employers are required to maintain material safety data sheets for each hazardous material present in the workplace, and they must be readily accessible to employees in a paper, electronic or another alternative format so long as no barriers to immediate access are created by such format.

## Heavy machinery

### 24 | What occupational health and safety rules govern the operation of heavy machinery? What are the practical implications of these rules?

OSHA regulation subpart O covers 'Machinery and Machine Guarding'. These standards include general requirements for all machines as well as requirements for specific types of machines. Generally, the point of operation, or the area on a machine where work is actually performed, must be guarded in some manner, and machines designed for the affixed location must be anchored to prevent movement.

Further, the machines with dedicated standards include:

- woodworking machinery;
- cooperage machinery;
- abrasive wheel machinery;
- mills and calendars in the rubber and plastic industries;
- mechanical power presses;
- forging machines; and
- mechanical power-transmission apparatus.

Employers using these types of machinery must be sure to adhere to the additional requirements imposed by these standards.

## General machinery

### 25 | What occupational health and safety rules govern the operation of general machinery in the workplace?

OSHA regulation subpart O covers 'Machinery and Machine Guarding'. These standards include general requirements for all machines as well as requirements for specific types of machines. Generally, the point of operation, or the area on a machine where work is actually performed, must be guarded in some manner, and machines designed for affixed locations must be anchored to prevent movement.

## Lock-out and tag-out

### 26 | What occupational health and safety rules govern how employees are protected while performing service and maintenance on machinery and equipment? Any there any exceptions to these rules?

OSHA's 'Control of Hazardous Energy (Lockout/Tagout)' standard requires employers to establish a programme consisting of energy control procedures, employee training and periodic inspections to ensure that before any employee performs any servicing or maintenance on a machine or equipment where the unexpected energising, start-up or release of stored energy could occur and cause injury, the machine or equipment shall be isolated from the energy source and rendered inoperative. The construction, agriculture, electric utilities, and oil and gas well drilling and servicing industries are exempt from the standard.

## Ergonomic risks and eye strain

### 27 | What rules and measures apply to manage ergonomic risks and eye strain in the workplace?

There are no OSHA standards related to ergonomics and eye strain. On 3 March 2001, President George W Bush signed Senate Joint Resolution 6, which rescinded the OSHA's prior ergonomics standard. Under the Congressional Review Act, OSHA is prohibited from issuing a rule that is substantially the same as a former one.

However, OSHA has issued extensive guidance on the topic of ergonomics and enforces it through the General Duty Clause of the Occupational Safety and Health Act (the OSH Act). Section 5 of the OSH Act, also known as the General Duty Clause, requires that employers

provide employees with a place of employment free from recognised hazards that causing or are likely to cause death or serious physical harm ('serious physical harm' means that a part of the body is damaged so severely that it cannot be used or cannot be used very well). If an employer fails to comply with OSHA ergonomics guidance and this failure results in workplace hazards that are causing or is likely to cause death or serious physical harm, then OSHA may issue a citation to the employer and assess civil penalties for a violation of the General Duty Clause.

## Noise and temperature

### 28 | What rules and measures apply to manage risks arising from workers' exposure to noise and temperature extremes?

OSHA's 'Occupational Noise Exposure' standard requires employers to utilise feasible administrative and engineering controls when employees are subjected to sounds exceeding certain thresholds. If those controls fail to reduce sound to an acceptable level then the employer is required to provide personal protective equipment. Where employees are exposed to sound equal to or exceeding an eight-hour time-weighted average sound level of 85 decibels, then the employer must implement a hearing conservation programme. Employers must provide periodic audiometric testing at no cost to employees to monitor their hearing. Employees must also receive information and training.

There are no OSHA standards related to working in hot environments. However, OSHA has issued extensive guidance on the topic of heat-related illness and enforces it through the General Duty Clause of the OSH Act. Employers should establish a heat illness prevention programme when workers are exposed to extreme heat. Employees working in extreme should be provided water, rest and shade. New or returning employees should be allowed gradually increased workloads and more frequent breaks to acclimatise. Additionally, employers must monitor employees for signs of illness. Employers should plan for emergencies and train employees on heat illness prevention.

Section 5 of the OSH Act, also known as the General Duty Clause, requires that employers provide employees with a place of employment free from recognised hazards that cause or are likely to cause death or serious physical harm ('serious physical harm' means that a part of the body is damaged so severely that it cannot be used or cannot be used very well). If an employer fails to comply with OSHA heat-related illness guidance and this failure results in workplace hazards that are causing or is likely to cause death or serious physical harm, then OSHA may issue a citation to the employer and assess civil penalties for a violation of the General Duty Clause.

## Fire risks

### 29 | What rules, restrictions and procedures govern the assessment and management of fire risks in the workplace?

OSHA's regulation subpart L covers 'Fire Protection'. Employers are required to adopt a written fire prevention plan that is available to employees. Also, employers are required to make portable fire extinguishers readily accessible to employees in the workplace. Additionally, standards govern the design, accessibility and maintenance of various fire protection systems, such as:

- standpipe hoses;
- automatic sprinklers;
- fixed extinguisher systems;
- fire detection systems; and
- employee alarm systems.

Further, there is a standard governing the organisation, training and personal protective equipment for fire brigades established by an employer.

## Psychiatric harm from stress, abuse and violence

### 30 | What rules and measures apply to prevent and address psychiatric harm arising from workplace stress, abuse and violence?

There are no OSHA standards related to psychiatric harm. However, OSHA has issued guidance on the topic of workplace violence and enforces it through the General Duty Clause of the OSH Act including for certain industries such as healthcare and social services, hospitals, late-night retail and taxi drivers. An employer that becomes aware of workplace violence, threats, intimidation, or other indicators of violence in the workplace is on notice of the risk of workplace violence and should implement a workplace violence prevention programme combined with engineering controls, administrative controls and training.

Section 5 of the OSH Act, also known as the General Duty Clause, requires that employers provide employees with a place of employment free from recognised hazards that causing or are likely to cause death or serious physical harm ('serious physical harm' means that a part of the body is damaged so severely that it cannot be used or cannot be used very well). If an employer fails to comply with OSHA heat-related illness guidance and this failure results in workplace hazards that are causing or is likely to cause death or serious physical harm, then OSHA may issue a citation to the employer and assess civil penalties for a violation of the General Duty Clause.

## Special categories of worker

### 31 | Are there any notable rules or procedures providing additional health and safety protection to special categories of worker?

There are no OSHA standards or guidance related to special categories of workers, such as pregnant, elderly or disabled workers.

## Other hazards and risks

### 32 | Are there any notable rules, restrictions or procedures applicable to other occupational hazards and risks in your jurisdiction?

OSHA's regulation subpart I covers 'Personal Protective Equipment'. Generally, employers are required to assess the workplace to determine if there are hazards present or likely present that necessitate the use of personal protective equipment (PPE). If so, the employer is required to provide and enforce the use of such necessary PPE. Employers must ensure PPE properly fits each employee and that damaged or defective PPE is not used. Employers must also communicate PPE decisions to employees and train employees on PPE. An employer cannot require an employee to provide or pay for his or her own PPE. However, if an employee chooses to provide adequate PPE, the employer may allow the employee to use it and is not required to reimburse the employee. There are also standards specific to various forms of PPE, including:

- eye and face protection;
- respiratory protection;
- head protection;
- foot protection;
- electrical protective equipment;
- hand protection; and
- personal fall protection systems.

## ENFORCEMENT

### Inspections and investigations

#### 33 | What rules and procedures govern the enforcement authorities' inspection of workplaces and investigation of employers for health and safety violations?

Section 5 of the Occupational Safety and Health Act of 1970 (the OSH Act) governs inspections and investigations. An Occupational Safety and Health Administration (OSHA) representative, upon presenting appropriate credentials to the owner, operator, or agent in charge, is permitted to enter any workplace where work is being performed to inspect or investigate during regular working hours or at other reasonable times. The OSHA representative may inspect all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein, and to question privately any such employer, owner, operator, agent or employee. The OSHA representative may also require the attendance and testimony of witnesses and the production of evidence under oath as part of an ongoing inspection or investigation. However, any information sought by OSHA shall be obtained with minimum burden on employers.

A representative of the employer and a representative authorised by his or her employees must be allowed to accompany the OSHA representative during the physical inspection of any workplace to aid such inspection. If is no authorised employee representative, the OSHA representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace. During the inspection, any employees may notify OSHA of any existing violations or hazards they have reason to believe exists in the workplace.

Employees who believe that a violation of an occupational health and safety standard exists that threatens physical harm or imminent danger may request an inspection by giving notice to OSHA. If OSHA has reasonable grounds to believe the allegations, OSHA must conduct a special inspection as soon as practicable.

### Cooperating with authorities

#### 34 | What best practices and practical considerations should employers bear in mind when cooperating with and responding to inspections and investigations by the health and safety authorities?

Crucially, employers should always be prepared for an OSHA inspection by having a plan and policies in place for the handling of inspections. Employers can greatly help themselves by actively cooperating with OSHA representatives by promptly responding to any requests as part of the inspection. However, employers should avoid volunteering information unnecessarily.

### Penalties and notices

#### 35 | What administrative penalties and notices may the authorities impose on employers for health and safety violations? Can these be appealed?

Section 9 of the OSH Act grants the Secretary of Labor (the Secretary) the power to issue citations if, upon inspection or investigation, the Secretary or his or her authorised representatives believe that an employer has violated a requirement under the OSH Act or an occupational health and safety standard promulgated under the Act. Section 17 of the OSH Act grants the Secretary the power to assess civil penalties for violations. OSHA will issue the employer a Citation and Notice of Penalty if it determines that a violation exists.

If the employer agrees to the Citation and Notification of Penalty, then they must abate the violation and pay any associated penalties. If the employer contests the Citation and Notification of Penalty, the



employer must file a written Notice of Intent to Contest with the OSHA area direction within 15 working days of receipt of the Citation and Notification of Penalty.

Before filing a Notice of Intent to Contest, the employer may request an informal conference with the OSHA area director. This is an opportunity to obtain more information regarding the violation and negotiate a settlement. However, this does not extend the deadline to file a Notice of Intent to Contest.

If a Notice of Intent to Contest is filed, the OSHA area direction will forward the employer's case to the Occupational Safety and Health Review Commission (OSHRC). The OSHRC will assign the case to an administrative law judge (ALJ) and a hearing date will be scheduled. Employers may represent themselves or hire outside counsel. The ALJ has the authority to affirm, modify, or dismiss any contested violation items or penalties.

After the ALJ has issued a final ruling, the employer and OSHA may appeal the decision to the OSHRC. The final ruling by the OSHRC may then be appealed to the federal circuit court where the case arose or the circuit court where the employer maintains the principal place of business.

### Civil liability

**36** | What is the extent of the employer's civil liability for health and safety violations? Can this liability be limited in any way? What defences apply?

Section 9 of the OSH Act governs penalties that may be issued by OSHA. There are various rules and limits on these penalties. OSHA's penalty amounts may be adjusted for inflation annually. The following penalties amount are based on OSHA's 2021 Annual Adjustments to OSHA Civil Penalties memorandum (and these civil penalties will continue to be adjusted over time).

Any employer who wilfully or repeatedly violates the OSH Act or occupational health and safety standards may be assessed a civil penalty of not more than US\$136,532 for each violation, but not less than US\$9,753 for each violation.

Any employer who has received a citation for a serious violation of the OSH Act or occupational health and safety standards shall be assessed a civil penalty of up to US\$13,653, but not less than US\$975 for each such violation.

Any employer who has received a citation for an other-than-serious or posting requirements violation of the OSH Act or occupational health and safety standards shall be assessed a civil penalty of up to US\$13,653 for each such violation.

Any employer who fails to abate a violation for which a citation has been issued within the period permitted for its correction may be assessed a penalty of up to US\$13,653 per day beyond the abatement date, though this is generally capped at 30 days.

### Criminal liability

**37** | May employers be criminally liable for health and safety violations? What defences apply?

Any employer who wilfully violates the OSH Act or any occupational health and safety standards standard or rule and that violation caused death to any employee, shall, upon conviction, be punished by a fine or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, the punishment shall be by a fine or by imprisonment for not more than one year, or by both.

Any person who gives advance notice of any inspection to be conducted under the OSH Act, without authority from the Secretary or his or her designees, shall, upon conviction, be punished by a fine or by imprisonment for not more than six months, or by both.

Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan or other document filed or required to be maintained under the OSH Act shall, upon conviction, be punished by a fine or by imprisonment for not more than six months, or by both.

Any person who kills a person while engaged in or on account of the performance of investigative, inspection, or law enforcement functions of the Occupational Safety and Health Administration shall be punished by imprisonment for any term of years or life.

### Director and officer liability

**38** | To what extent may company directors and officers be held liable for health and safety violations?

The OSH Act provides no statutory basis for extending liability for occupational health and safety violations to individual officers or directors. Generally, the employer entity itself is held liable. However, in some rare instances, OSHA has attempted to pierce the corporate veil to impose personal liability on owners, directors and corporate offices in extreme cases or where OSHA feels the corporate entity is being inappropriately used for the sole purpose of shielding from liability for fraud or injustice.

## UPDATE AND TRENDS

### Recent developments

**39** | What have been the most significant recent occupational health and safety developments in your jurisdiction, including any notable court decisions and regulatory actions?

The most significant developments in occupational health and safety relate to the unprecedented challenge all employers (as well as employees and other stakeholders) faced due to the covid-19 pandemic.

### Covid-19

**40** | What occupational health and safety measures have the authorities in your jurisdiction taken in response to the covid-19 pandemic? How have employers complied with these measures to protect their employees?

The Occupational Safety and Health Administration (OSHA) has been engaged in working on the covid-19 pandemic since early 2020. OSHA worked closely with the Centers for Disease Control and Prevention to develop guidance in the early months of the pandemic. A wide variety of guidance documents were issued in 2020 and OSHA also conducted enforcement largely informal enforcement but also onsite enforcement in the healthcare industry. The new Administration in January 2021 called further attention to OSHA's role in the covid-19 pandemic and has taken several recent actions. It recently released the Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace, which aims to identify exposure risks to certain employees and to assist employees in taking steps to prevent exposure and infection. OSHA also recently issued a COVID-19 Health Care Emergency Temporary Standard for occupational exposure to covid-19, imposing obligations on some healthcare employers where employees work in settings where patients with confirmed or suspected covid-19 cases are treated.



# Morgan Lewis

# GLOBAL REACH

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