

# 2022 OSHA Priorities in Biden Administration

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**CGFA Grain and Feed Industry Conference**  
**Monterey, Calif.**  
**January 12, 2022**

# Topics

- DOL/OSHA Leadership
- COVID-19
- FY21 OSHA Inspection Data
- Regulatory and Enforcement Priorities in Biden Administration

# NGFA – 125 Years Young

- Founded as the Grain Dealers National Association on November 9, 1896 at the Saratoga Hotel in Chicago, Illinois
  - Grain and Feed Dealers Association -- 1929
  - National Grain and Feed Association -- 1970
- 80 Charter Members

# NGFA Membership Today

## More than 1,000-Member Companies:

- Grain elevators
- Feed, feed ingredient manufacturers
- Oilseed processors
- Flour, corn mills
- Biofuels producers
- Integrated livestock producers
- Risk management firms
- Transportation providers
- Many other related agri-businesses
- 27 State/Regional Associations



# NGFA On Behalf of Our Members

- Voice of the Industry
- Advocacy
- Safety Programs
- Arbitration



Source: istock.com

# What Can We Expect with DOL/OSHA in the Second Year of the Biden-Harris Administration?



# Secretary of Labor

- Jan. 7th - President-Elect Joe Biden announced former Boston Mayor Marty Walsh as his nominee. Confirmed on March 22.
- Former President of Laborers' Union Local 223 and Head of the powerful Boston Metro Building and Constructions Trade Council (umbrella org. of 20 local unions) from 2011-13
- Former Rep in MA House of Representatives
- Rumors that he is interested in running for Governor of MA
- What to expect:
  - COVID-19 (ETS and more enforcement)
  - Restart the rulemaking apparatus



# Doug Parker – Assistant Secretary for OSHA

- Confirmed by U.S. Senate on October 25.
- Director of Cal/OSHA, oversaw the development and adoption of California's Emergency Temporary Standard (ETS) addressing COVID-19 in the workplace.
- As a strong proponent of the ETS, he likely played a role in developing the federal OSHA draft standard that was published.
- Previously served in the Obama administration as deputy assistant secretary for policy in the Department of Labor's Mine Safety and Health Administration and as a member of the Biden administration's transition team focused on worker health and safety issues.



# Current OSHA Leadership

- Acting Deputy Assistant Secretary for Occupational Safety and Health beginning on Jan. 20
- James Frederick, has worked in safety and health for three decades, including twenty-five years with the United Steelworkers Union as Assistant Director and Principal Investigator until 2019.

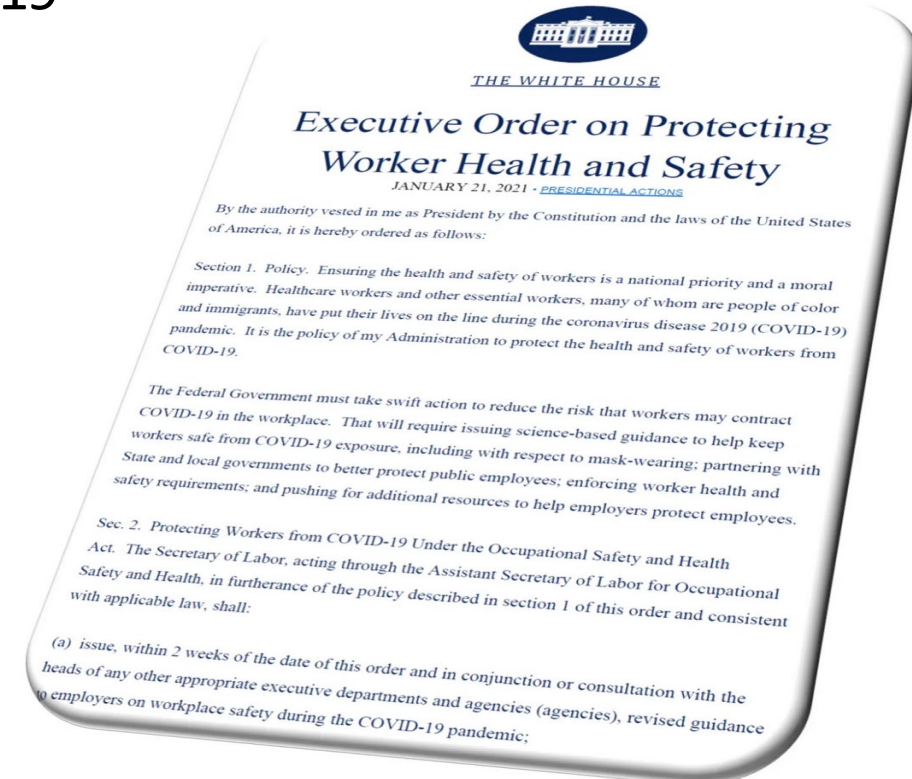


# COVID-19

# Biden's Day 1 OSHA Exec. Order

1<sup>st</sup> full day in Office, Biden issued “**Executive Order on Protecting Worker Health and Safety**,” directing OSHA to revisit its COVID-19 strategy in 4 ways specific ways:

1. Enhance OSHA's COVID **enforcement**
2. Launch a COVID-19 enforcement **National Emphasis Program**
3. By Feb., OSHA to consult w/ CDC and other agencies to **update COVID-19 workplace guidance**
4. **Consider whether an ETS is needed** and “if” OSHA concludes it is, **issue it by March 15<sup>th</sup>**, and **require State OSH Plans to adopt one**

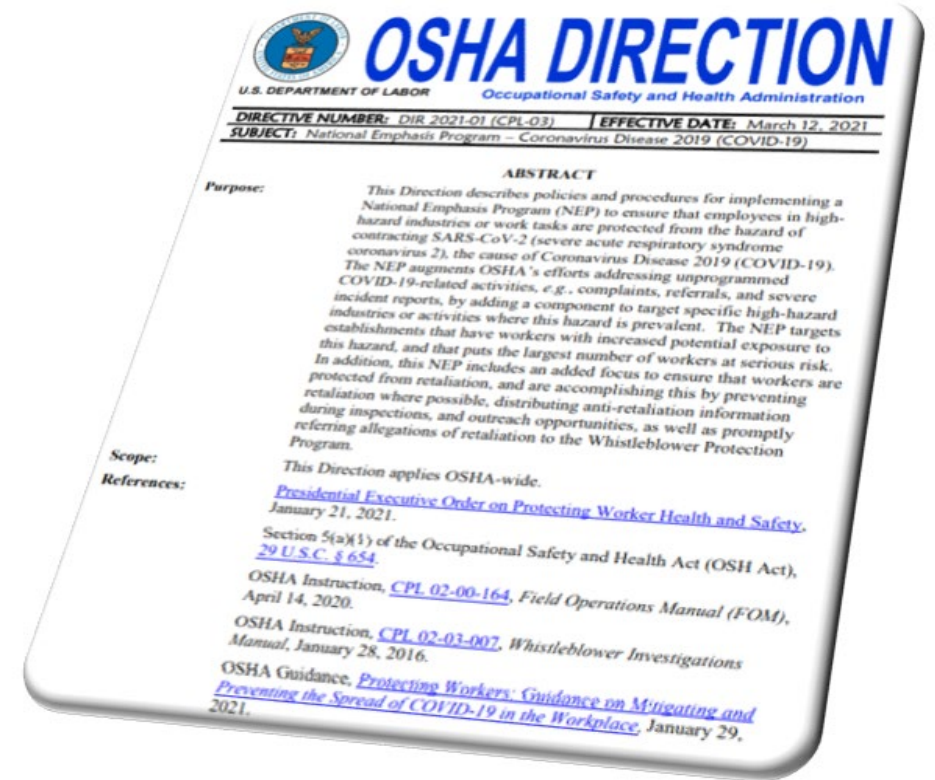


# COVID-19 National Emphasis Program

- March 12 - OSHA launched a **COVID-19 Nat'l Emphasis Program** to:

- *"focus inspection and enforcement efforts on companies that put the largest # of workers at serious risk of contracting the virus," as well as prioritizing employers that "retaliate against workers for complaints about unsafe/unhealthy conditions or exercise other rights protected by federal law."*

- Effective immediately
- Accompanied by new **Interim Enforcement Response Plan** (more on-site inspections)



# COVID-19 National Emphasis Program

- OSHA to develop target lists for programmed inspections: (i) High risk healthcare; (ii) High risk non-health care (e.g., warehousing and grocers); and (iii) Non-healthcare critical infrastructure
- Workplaces already inspected in 2020 may see follow-up visit
- NEP adoption by state plans encouraged but not required
- Establishments with fewer than 10 employees are covered
- NEP to remain in place for 12 mos. but may be extended/canceled
- \$100M in COVID-19 Relief Law for OSHA
- At least 5% of OSHA inspections ( $\approx$  2,000) to be COVID-19 NEP inspections
- Establishments on the NEP list & OSHA's Site-Specific Targeting List will see combined COVID NEP inspection and wall-to-wall SST inspection

# OSHA COVID-19 National Emphasis Program (cont.)

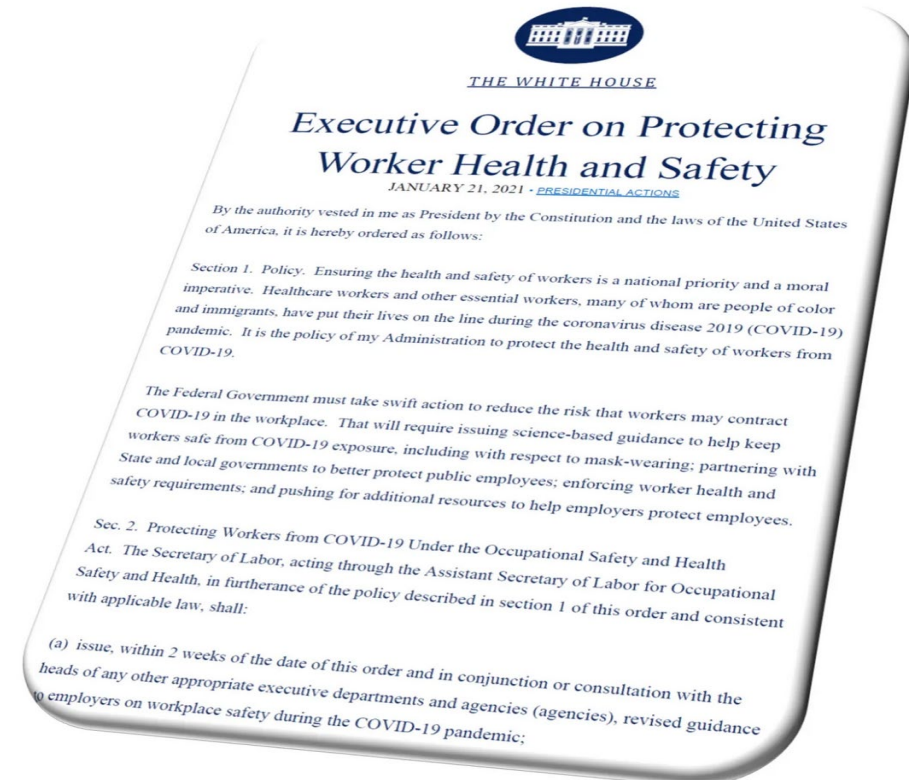
- The primary high hazard industries are mostly related to health care but also include:
- 311612 Meat Processed from Carcasses;
- 311611 Animal (except Poultry) Slaughtering; and
- 311615 Poultry Processing.
- In particular, the secondary targeted industries include:
- 311xxx – Food Manufacturing; and
- 4422 Nursery, Garden Center, and Farm Supply Stores

311119	Other Animal Food Manufacturing
311211	Flour Milling
311212	Rice Milling
311213	Malt Manufacturing
311221	Wet Corn Milling
311224	Soybean and Other Oilseed Processing
311225	Fats and Oils Refining and Blending
311230	Breakfast Cereal Manufacturing
311313	Beet Sugar Manufacturing

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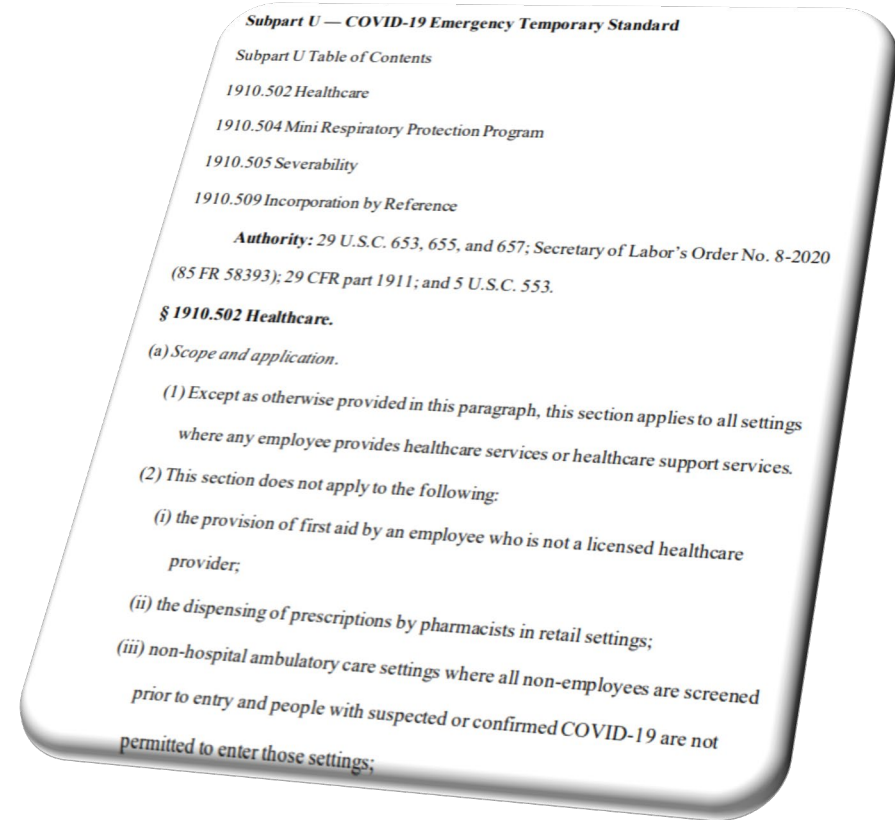
# ETS For All of General Industry?



- Original proposed ETS delivered to OMB April 27<sup>th</sup>:
  - OSHA “*has determined that employee exposure to this new hazard, SARS-CoV-2 (the virus that causes COVID-19) presents a grave danger in every shared workplace in the U.S.*”
  - Proposed ETS included onerous provisions for all industries (did not distinguish based on vaccination)
  - No accounting for small employers

# COVID-19 Emergency Standard

- Proposed ETS spent 6 weeks at OMB, during which:
  - U.S. vaccination program successfully drove down cases and deaths
  - CDC issued guidance relaxing COVID protocols for vaccinated individuals
  - OMB took 51 stakeholder meetings
- 6/10/21 - 16 months into pandemic, OSHA revealed a COVID ETS, but ***limited to healthcare sector only***
- Decision to limit ETS to healthcare has been challenged by AFL-CIO et al. (if successful, DC Cir. could require OSHA to extend ETS to cover every workplace, as OSHA originally intended)



# Revised COVID-19 NEP

- On July 8, OSHA revised its [National Emphasis Program](#) (NEP) for COVID-19 and published an updated [Interim Enforcement Response Plan \(IERP\)](#)
- The primary high hazard industries are mostly related to health care and still include: 31612 Meat Processed from Carcasses; 311611 Animal (except Poultry) Slaughtering; and 311615 Poultry Processing.
- **However, the most significant change is that Appendix B which was the list of Secondary Target Industries for the former COVID-19 NEP has been removed from the revised NEP. The secondary target industries did include Food Manufacturing – 311xxx which covers milling and processing.**

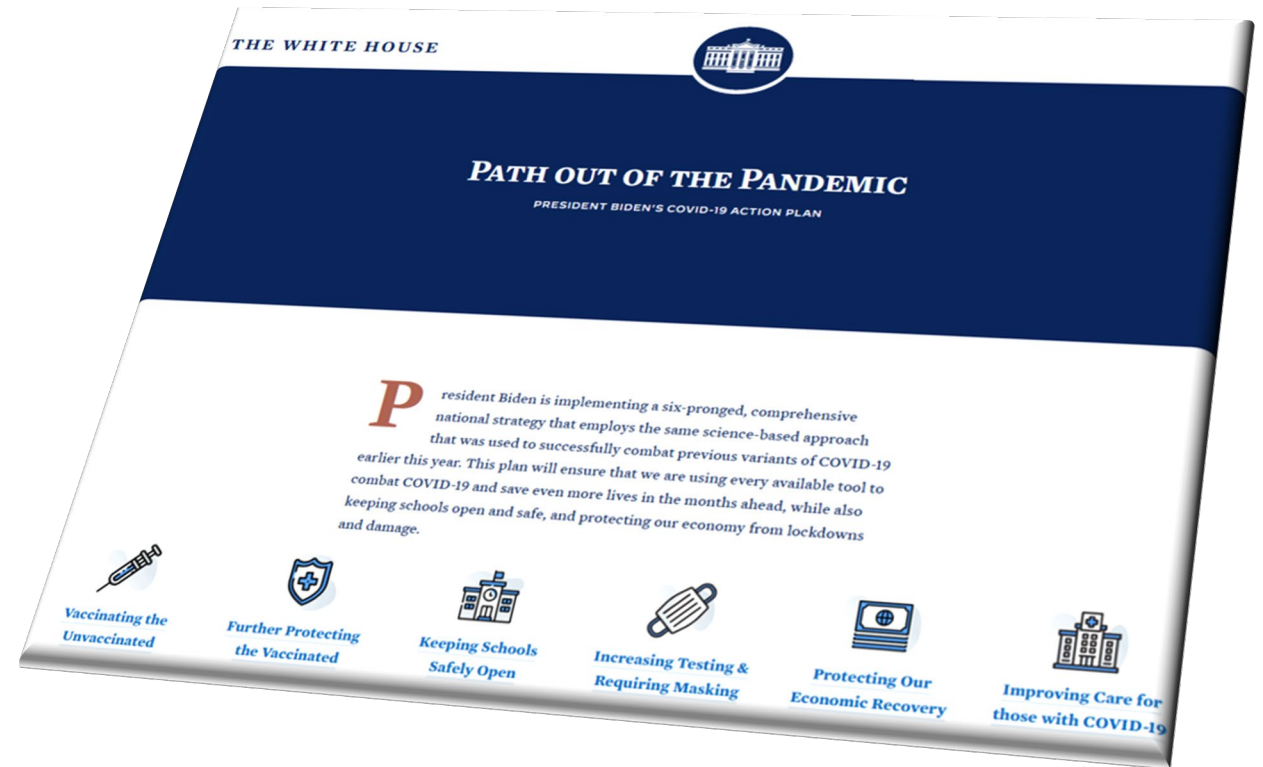
# NGFA Submitted Comments to OSHA

- The *Employers COVID-19 Prevention Coalition*, of which NGFA is a member, formally submitted comments to OSHA regarding the ETS for COVID-19. The Coalition provided numerous suggestions and recommendations that focus on providing flexibility to employers to comply with many federal, state and local guidelines that have been in place since the pandemic began i.e., CDC guidelines.
- As a member of the *Coalition of Workplace Safety*, NGFA submitted comments to OSHA outlining concerns with the agency's COVID-19 ETS issued in June. The coalition is led by organizations including the U.S. Chamber of Commerce. In the comments submitted to OSHA, the coalition noted that it believes the circumstances do not warrant the issuance of a COVID-19 ETS and the process to produce the ETS was arbitrary and capricious.

# President's Path Out of the Pandemic

Sept. 9<sup>th</sup> – President Biden introduced his 6-prong plan to combat COVID-19 through the Fall of 2021

1. **Vaccinate the unvaccinated**
2. Improve care for the infected
3. Protect the vaccinated from the unvaccinated
4. More test & mask requirements
5. Keep schools safely open
6. Protect economic recovery



# NGFA and Coalition Comments to DOL and USDA

NGFA submitted our own comments and signed onto the comments submitted by the *Employers COVID-19 Prevention Coalition*.

Some key points of the comments include requesting:

- employees who are key components of the nation's food supply chain be exempted from the mandatory vaccinations;
- implementation of the rule be phased and not become effective until at least 75 days after publication;
- not making employers pay for the tests;
- flexibility in recordkeeping and a clear definition of “fully vaccinated;” and
- allowing for the unvaccinated to continue to report to work during any shortage of tests and delays in results.

# Timeline for ETS Rulemaking

<b>Sept. 9</b>	Biden directs OSHA to issue an ETS on vaccination and testing
<b>Oct. 13</b>	OSHA delivers proposed final ETS to White House's OMB
<b>Oct. 25</b>	Doug Parker confirmed as Pres. Biden's Head of OSHA
<b>Oct. 13 – 29</b>	OMB held 130 EO 12866 meetings to hear stakeholder input
<b>Nov. 1</b>	OMB "Concluded" its review of the proposed ETS
<b>Nov. 5</b>	Final ETS published in the Federal Register

# Original ETS Compliance Timeline

Employer Requirement	Compliance Deadline
Written Vaccination Policy	December 6, 2021
Begin Providing PTO for Time Getting Vaccinated	December 6, 2021
Begin Providing PTO for Ill Effects of Vaccination	December 6, 2021
Removal from Workplace of COVID-19 Positive Cases	December 6, 2021
Face Coverings for Unvaccinated Employees	December 6, 2021
Confirm Vaccination Status of Workforce	December 6, 2021
Begin Testing Mandate (verify weekly negative test to report to work)	January 4, 2022

# What is a Federal Contractor?

- President Biden's EO for federal employees defines a contractor as one who provides products to the government. There is concern that any company that provides a product, i.e., sells grain to USDA, USAID, etc., would be considered a federal contractor and have additional compliance requirements.
- Have reached out to the Office of General Counsel at the USDA for clarification and have yet to receive a definitive response.

# OSHA Emergency Temporary Standard

- Issued on November 5
  - Must comply by December 5
  - Employees to be vaccinated by January 4
  - Applies to companies with over 100 employees (full-time, part-time, seasonal and temporary)
- Pre-empts State Plan States
  - State OSH agencies will need to adopt amendments that reflect these new vaccination and testing requirements within 30 days.
- If a business fails to comply with the rule they could face fines up to \$14,000 per Serious or Other-than-Serious violation.

# ETS and State Plan States

- If OSHA's ETS goes forward, employers may see a variety of approaches in the 22 State Plans that govern private employers. Some states, like California, may promulgate standards stricter than OSHA's. Many State Plans likely will adopt a federal-identical standard mirroring OSHA's.
- Other State Plans may decline to adopt any standard at all i.e. Arizona.
- State OSH agencies will need to adopt amendments that reflect these new vaccination and testing requirements within 30 days.
- Key Industry State Plan States include: Michigan, Minnesota, Indiana, Iowa and Washington.

# Who Is Covered?

- Employers w/ 100 or more employees company-wide
  - Includes part-time, seasonal, and all other employees hired directly by employer regardless of work location (e.g., home-based, outdoors, etc.)
  - NOT include temp workers from a staffing agency or indep. Contractors
  - # of employees as of 11/5/21 (or any date after if count increases to 100; e.g., seasonal hires) - once triggered, employer is covered for duration of ETS
- Each employer on multi-employer worksites to count only their own employees to determine ETS coverage
- Independently owned and operated franchises are separate entities such that franchisees count only employees of their individual franchise
- 2 or more related corporate entities may be a single employer for ETS purposes if they handle safety matters as 1 company

# Who Is NOT Covered by the ETS?

- Although included in the employee-count to determine coverage, the substantive requirements of the ETS do NOT apply to:
  - Workplaces covered by OSHA's COVID-19 ETS for healthcare (while it remains in effect – only until mid-December '21)
  - Workplaces covered by vaccine-mandates for fed contractors
  - Employees who do not report to a workplace where other individuals are present (co-workers or public)
  - Employees who work from home
  - Employees who work outdoors

# Is a Truck Driver Covered by the ETS?

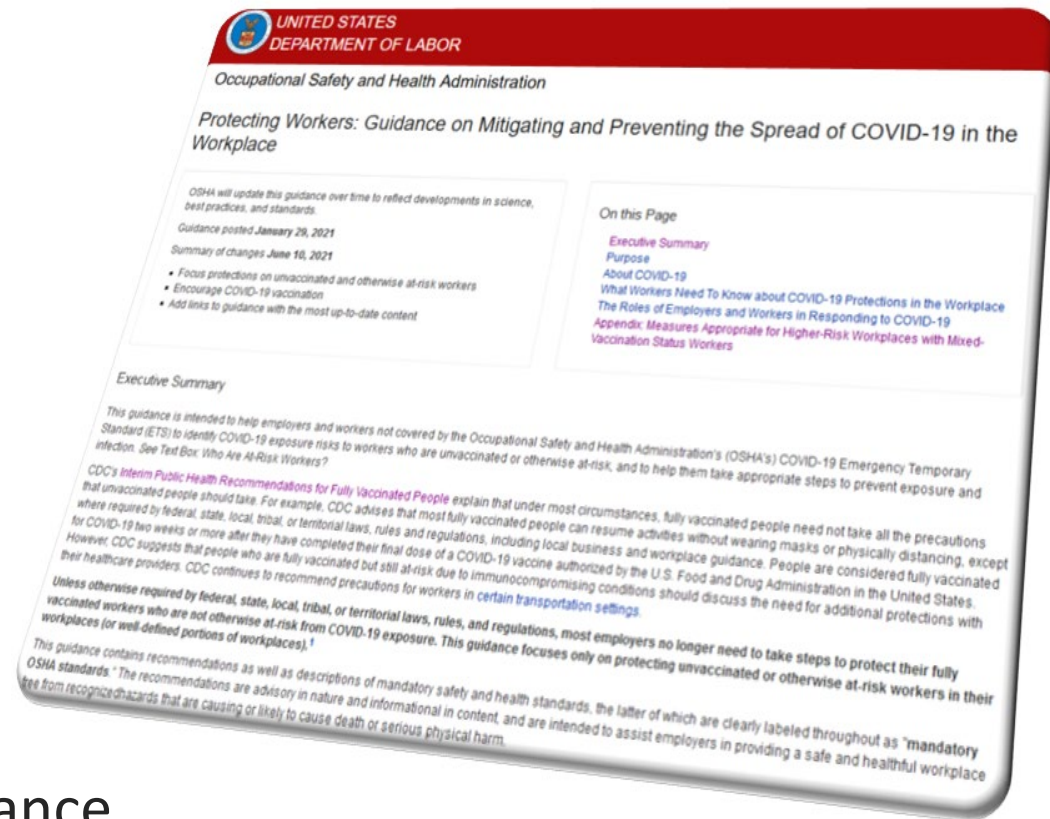
The ETS Requirement for an employer does not apply to the following:

- Employees who do not report to a workplace where other individuals (e.g., coworkers or customers) are present
- Employee working from home
- Employees who work exclusively outdoors

To the extent that the truck driver interacts indoors with others (e.g., at dispatch or during loading/unloading), that would likely trigger application of the ETS. However, if those interactions are **outside**, such as an outdoor loading dock, on the other hand, that would not trigger coverage, since there is also an exemption in the ETS for employees who work exclusively outdoors.

# Updated COVID-19 Guidance

- Purpose of new guidance is to help ensure employers continue to protect non-vaccinated workers in non-healthcare settings
- The updated Guidance:
  - Shifts focus to protecting non-vaccinated and other at-risk workers
  - Creates incentives to encourage vaccination
  - Shares links to up-to-date CDC and other industry guidance



# 8 Core Requirements of the ETS

- PTO for time getting vaccinated
- Paid sick leave for time recovering from vaccination
- Written vaccination, testing, and face covering policy
- Soft vaccine mandate (i.e., proof of fully vaccinated status or a weekly negative test to report to work)
- Face coverings for unvaccinated workers
- Notice, medical removal and return-to-work for COVID cases
- Provide info to employees re: ETS and related issues
- Report all work-related COVID-19 hospitalizations or deaths regardless of time b/n exposure and outcome

# Documenting Vaccination Status

Employees must provide “acceptable proof” of vaccination status:

- Copy of the COVID-19 Vaccination Card;
- Record of immunization from healthcare provider or pharmacy;
- Copy of medical records documenting vaccination;
- Copy of immunization records from health dept. information system; or
- Any other official document that lists type of vaccine, dates of vaccination, and ID of healthcare professional or site administering the vaccine

**COVID-19 Vaccination Record Card**

Please keep this record card, which includes medical information about the vaccines you have received.  
Por favor, guarde esta tarjeta de registro, que incluye información médica sobre las vacunas que ha recibido.

Last Name \_\_\_\_\_ First Name \_\_\_\_\_ MI \_\_\_\_\_

Date of birth \_\_\_\_\_ Patient number (medical record or IIS record number) \_\_\_\_\_

Vaccine	Product Name/Manufacturer	Lot Number	Date	Healthcare Professional or Clinic Site
1 <sup>st</sup> Dose COVID-19				

# What About Self-Attestation?

If employee cannot produce “acceptable proof” of vaccination, employee can self-attest to status in a signed and dated statement that includes:

- Attestation of vaccination status
- Attestation they have lost or otherwise are unable to produce proof
- The employee’s best recollection of the type of vaccine, dates of vaccination, and the ID of healthcare provider or site administering the vaccines
- *“I declare that this statement about my vaccination status is true and accurate. I understand that knowingly providing false information regarding my vaccination status on this form may subject me to criminal penalties.”*

Grandfathering prior verification –

- If an employer collected employees’ vaccination status in any form prior to the ETS effective date, and retained records of that, the employer is exempt from the specific verification requirements of the new ETS for those employees

# Documenting Test Results

- Employers must maintain records of employee COVID testing, and employers must determine an effective method to verify the results
- Records of testing must include:
  - Employee ID (i.e., full name + at least another identifier, such as DOB)
  - Date of test sample collection
  - Type of test
  - Entity issuing the result (e.g., lab, healthcare entity)
  - Test result
- Employees ***CANNOT*** self-administer and self-report test results
- Employers may verify results by reliance on healthcare provider to conduct test, or requiring employee to conduct the test and read results under the observation of an authorized employee or telehealth proctor

# Record Preservation Requirements

- Proof of vaccination, vaccination status rosters, and test records are considered employee medical records under 29 CFR 1910.1020 (OSHA's Access to Employee Medical Records regulation)
- **However**, the ETS exempts these records from the 30+ record preservation requirement of medical record requirements.
- Rather, records to comply with the soft vaccine mandate:
  - Must be protected as confidential records (not in employee personnel files)
  - Need only to be retained during the term of the ETS
  - Vaccination "Roster" must be produced to OSHA w/in 4 hours of request
  - Documentation of proof of vaccination and testing must be produced upon request to OSHA by the end of the next business

# Legal Challenges to the ETS

# Legal Challenges to the ETS

- Nov. 5-15 - 34 legal challenges to the ETS initiated by 26 States, individual businesses, religious groups, and by unions (for strategic reasons). Cases were filed in all 12 regional Courts of Appeals – 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> & DC Circuits.
- Nov. 5 – 5<sup>th</sup> Circuit issues a temporary Stay of ETS pending further action
- Nov. 12 – After expedited briefing, 5<sup>th</sup> Circuit granted TRO to Stay ETS until further judicial action. Ordered OSHA to take no further steps to implement/enforce ETS
- Nov. 16 – The 6<sup>th</sup> Circuit Court of Appeals was selected through the lottery system to hear the consolidated action and will be authorized to uphold or lift the 5th Circuit's order halting the rule.
- Nov. 19 – OSHA updated its [ETS website](#) to note that it “has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.”

# Legal Challenges to the ETS (cont.)

- On December 17, a Sixth Circuit panel dissolved the stay issued by the Fifth Circuit in a 2-to-1 ruling, allowing the ETS to go into effect. Fourteen different applications for a stay have already been filed in the U.S. Supreme Court. The schedule for the merits briefing in the 6<sup>th</sup> Circuit is as follows:
  - January 31, 2022: DOJ's opening brief
  - March 2, 2022: State's response due
  - March 23, 2022: DOJ's reply due
- On December 22, the U.S. Supreme Court scheduled oral argument for the OSHA ETS case to occur on Friday, January 7. The Court order does not include an administrative stay. The Supreme Court requested OSHA to respond to the stay applications by December 30. Replies were due January 3.

# Current ETS Compliance Timeline

Employer Requirement	Compliance Deadline
Written Vaccination Policy	January 9, 2022
Begin Providing PTO for Time Getting Vaccinated	January 9, 2022
Begin Providing PTO for Ill Effects of Vaccination	January 9, 2022
Removal from Workplace of COVID-19 Positive Cases	January 9, 2022
Face Coverings for Unvaccinated Employees	January 9, 2022
Confirm Vaccination Status of Workforce	January 9, 2022
Begin Testing Mandate (verify weekly negative test to report to work)	February 10, 2022

# Congressional Review Act

- On December 8, 2021, the U.S. Senate approved a Congressional Review Act (CRA) joint resolution that would rescind OSHA's ETS. The resolution passed, 52–48, with Democratic senators Jon Tester (MT) and Joe Manchin (WV) joining all 50 Republican senators in voting to rescind the ETS.
- The CRA allows Congress to challenge rules issued by the executive branch. If passed, the ETS would be nullified, and OSHA would not be able to issue any substantially similar rule in the future.
- Of course, even if the House were to take up and pass a CRA resolution, President Biden would almost assuredly veto the measure.

# Religious Exemptions

- Employees may request religious exemptions if the provisions in the employer policy for vaccination, and/or testing for COVID-19, and/or wearing a face covering conflict with a sincerely held religious belief, practice, or observance.
- OSHA encourages stakeholders to refer to the EEOC guidance document on this specific issue.

# OSHA Enforcement of ETS

- To account for the litigation uncertainty, OSHA issued an enforcement policy stating that it “is exercising enforcement discretion with respect to the compliance dates of the ETS.” ***It will not issue any citations before January 10 and will not enforce the vaccine or testing requirement until February 9 “so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.”***
- Still key unanswered questions such as: 1) definition of vaccinated and 2) what to do with lack of test kits.
- The Bottom Line: The OSHA ETS is in effect at this time until the Supreme Court either issues a stay or nullifies the mandate. As a result, employers should work in “good faith” to implement the standard’s requirements.

# OSHA Enforcement, Inspection Data and Programs

# Enforcement Emphasis Programs

- Local
  - Grain Handling
    - Region V (IL, IN, WI, MI, OH) Expires – 9/30/2023
    - Region VI (AR, LA, NM, OK, TX) Expires – 12/31/21
    - Region VII (IA, KS, MO, NE) Expires – 9/30/24
    - Region VIII (CO, MT, ND, SD, UT, WY) Expires – 9/30/24
    - Region X (AK, ID, OR, WA) Expires – 12/31/21
- According to a recent [OSHA Directive](#), the REP or LEP can now be extended for up to 5 years. In other words, they don't have to be renewed and approved annually.

# Grain Handling Emphasis Programs

- Programmed inspections + inspections of fatalities, complaints, follow-ups, or referrals at grain facilities expanded under the L/REP
- NAICS Codes typically covered: Grain and Field Bean Merchant Wholesalers, Farm Product Warehousing and Storage, Flour and Rice Milling, Other Animal Food Manufacturing
- Inspections typically evaluate:
  - Hazards associated w/ grain storage; milling operations; fertilizer, feed, and chemical operations; and equipment repair or maintenance
  - Engulfment / entanglement during bin entry, and other confined space hazards in bins and boot pits (e.g., atmospheric, mechanical, etc.)
  - Fire and explosion hazards created by combustible dust
  - Falls (e.g., from atop bins/decks or rolling stock)
  - Other - Machine Guarding, Noise, Electrical Safety

# Enforcement Priorities in Biden Administration

- Increase worker safety criminal investigations/prosecutions
- Prioritize more complex inspections, such as PSM inspections (i.e., revitalize Enforcement Weighting system)
- More robust Chemical/Refinery PSM NEP
- Significant increase in “regulation by shaming” enforcement press releases
- Restrict settlement flexibility
- Office approval for big penalty reduction or withdrawn citation, etc.)
- Focus on whistleblower 11(c) actions

# Enforcement Priorities (cont.)

- Likely to see efforts to significantly increase OSHA's budget and staffing
- Enact the Protecting America's Worker Act (OSHA Reform Legislation) w/ a Democratic-controlled House and Senate
- Attack on VPP (e.g., preemptive removal based on incidents and alleged violations)
- Revitalize the CSB

# Enforcement Priorities (cont.)

- Shaming Campaigns: A Biden DOL will likely go back to the “naming and shaming” campaign that sought maximum publicity when the Department filed complaints against employers—even when those complaints were dropped, or penalties were reduced in settlements.
- Regulation through Interpretation – In the Obama Administration, OSHA tried to avoid the stakeholder notice and comment rulemaking process by issuing memorandums and interim policy documents that “reinterpreted” previous letters of interpretation and changed the scope of the application of certain standards.
  - Two examples, include their attempt to [change the definition of a “family farm”](#) so they could have jurisdiction in the case of an injury or fatality and to [narrow the Process Safety Management standards exemption for “retail facilities.”](#)

# OSHA Letter to Industry on Engulfment

OSHA has investigated several cases involving worker entry into grain storage bins where we have found that the employer was aware of the hazards and of OSHA's standards, but failed to train or protect the workers entering the bin," wrote OSHA Administrator David Michaels.

U.S. Department of Labor

Assistant Secretary for  
Occupational Safety and Health  
Washington, D.C. 20210



4 AUG 2010

Dear Grain Storage Facility Operator:

Last week, two teenagers (ages 14 and 19) were killed in a tragic incident involving a grain elevator in Illinois. Both young workers suffocated after being engulfed in a grain bin they had entered to help clear. A third young worker was pulled out of the storage bin alive, and was hospitalized after being trapped for 12 hours.

Unfortunately, this was not a rare occurrence. Researchers at Purdue University documented 38 grain entrapments in 2009 alone. OSHA has found that grain entrapments generally occur because of employer negligence, non-compliance with OSHA standards, and/or poor safety and health practices.

I am writing to you today because it is your responsibility to prevent your workers from dying in grain storage facilities. All employers, and especially those in high hazard industries such as the grain industry, must recognize as well as prevent workplace hazards. As an employer, you must be vigilant and always follow the long established, common sense safety practices that will prevent these tragedies. A copy of OSHA's *Grain Handling Facilities* standard, 29 CFR 1910.272, is enclosed for your reference. This standard contains the rules that must be followed. States that operate their own occupational safety and health programs under plans approved by Federal OSHA enforce comparable standards but may have different or additional requirements. A list of State plans is available at [www.osha.gov/dcspp/osp/index.html](http://www.osha.gov/dcspp/osp/index.html).

When workers enter storage bins, employers must (among other things):

- 1) Turn off and lock out all powered equipment associated with the bin, including augers used to help move the grain, so that the grain is not being emptied or moving out or into the bin. Standing on moving grain is deadly; the grain acts like 'quicksand' and can bury a worker in seconds. Moving grain out of a bin while a worker is in the bin creates a suction that can pull the worker into the grain in seconds.
- 2) Prohibit walking down grain and similar practices where an employee walks on grain to make it flow.
- 3) Provide all employees a body harness with a lifeline, or a boatswains chair, and ensure that it is secured prior to the employee entering the bin.
- 4) Provide an observer stationed outside the bin or silo being entered by an employee. Ensure the observer is equipped to provide assistance and that their only task is to continuously track the employee in the bin.
- 5) Prohibit workers from entry into bins or silos underneath a bridging condition, or where a build-up of grain products on the sides could fall and bury them.

# OSHA's Repeat Violation Policies

## OSHA Historically:

- Treated workplaces as individual, independent establishments
- Limited its review of employers' OSHA records to 3 years
- Reactive Philosophy (less likely to revisit workplaces within a few years)

## Under Obama/Biden:

- Treats workplaces in a corporate family as 1 workplace
- Look back 5 yrs at employers' record of enforcement
- Proactive Targeting (more follow-up inspections / hand select past violators for inspection)

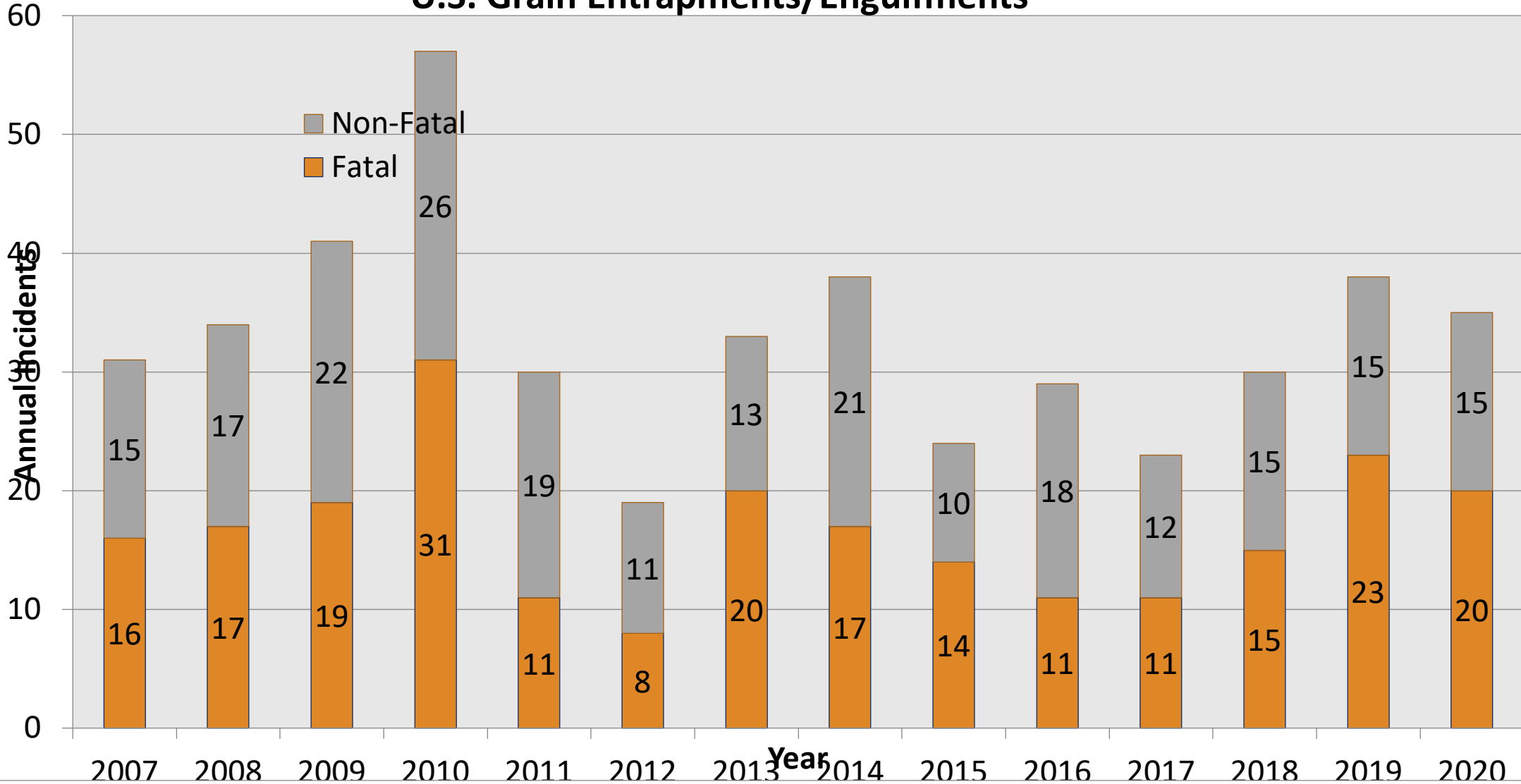
# OSHA's FY 21-22 Budget

- The agency had a revised enacted budget of \$591.2 million in FY 2021 and are currently under a CR until.
- \$100 million from COVID-19 Relief bill in March 2021 to assist with standards and enforcement and is requesting an additional \$73 million funding increase in its budget request.
- Secretary Walsh wants to double the number of OSHA inspectors by the end of Biden's first term. The Department's [budget](#) lists 1,820 FTEs in FY 2020 and proposes 2,250 for FY 2022.WW

# House Appropriations Bill for OSHA IN FY 22

- [H.R. 4502](#) allocates \$691.8 million to OSHA for fiscal year 2022, which begins Oct. 1. That total is \$27.2 million more than what the Biden administration proposed in its first budget request, issued May 28.
- Included in that figure is a nearly \$45 million increase to OSHA's enforcement budget, according to a [House Appropriations Committee report](#) released July 14.
- The bill also features an almost \$16 million increase in compliance assistance over FY 2021, a nearly \$11 million increase in whistleblower enforcement and an approximate \$10.5 million increase in the safety standards budget.

# U.S. Grain Entrapments/Engulfments



# OSHA Enforcement Data

- According to OSHA data obtained in a 2020 FOIA request response, OSHA had 800 inspectors in FY 2016, 770 in FY 2017, 733 in FY 2018, 752 in FY 2019, and 790 in FY 2020.
- During the last four years of the Obama Administration, the number of OSHA inspections ranged from a high of over 39,000 to a low of just under 32,000.
- During the first two years of the Trump Administration, OSHA conducted just over 32,000 inspections per year, rising to 33,401 inspections in FY 2019.

# OSHA Enforcement Data (cont.)

- FY 2020
  - The lowest number of citations and penalties issued
- Over 40,000 inspection from 2010-2012
- Over 96,000 citations issued in 2010
- On avg of over 80,000 citations issued between 2011-2013 before declining to ~60,000 by 2016.

# Top 10 Most Frequently Cited OSHA Standards in FY 20

OSHA Standard	FY 2021 Preliminary Data	Previous Year's Data
<b>1. Fall Protection – General Requirements (<a href="#">1926.501</a>)</b> • <a href="#">OSHA Fall Protection Defense Guide</a> • <a href="#">Construction Fall Protection Standards</a>	5,271 Violations	No. 1 with 5,424 Violations
<b>2. Respiratory Protection (<a href="#">1910.134</a>)</b> • <a href="#">Selecting and Using Particulate Respirators</a> • <a href="#">Starting a Respiratory Protection Program</a>	2,521 Violations	No. 3 with 2,649 Violations
<b>3. Ladders (<a href="#">1926.1053</a>)</b> • <a href="#">Are Your Ladders Compliant?</a> • <a href="#">Ladder Safety Tips</a>	2,018 Violations	No. 5 with 2,129 Violations
<b>4. Scaffolding (<a href="#">1926.451</a>)</b> • <a href="#">OSHA Scaffolding Requirements for Construction and General Industry</a>	1,943 Violations	No. 4 with 2,538 Violations
<b>5. Hazard Communication (<a href="#">1910.1200</a>)</b> • <a href="#">OSHA's Revised Hazard Communication Standard</a>	1,939 Violations	No. 2 with 3,199 Violations
<b>6. Lockout/Tagout (<a href="#">1910.147</a>)</b> • <a href="#">When Does the Lockout/Tagout Standard Apply?</a>	1,670 Violations	No. 6 with 2,065 Violations
<b>7. Fall Protection – Training Requirements (<a href="#">1926.503</a>)</b> • <a href="#">ANSI/ASSP Z359: Fall Protection Standards System</a>	1,660 Violations	No. 8 with 1,621 Violations
<b>8. Personal Protective and Life Saving Equipment – Eye and Face Protection (<a href="#">1926.102</a>)</b> • <a href="#">PPE Requirements: Eye and Face Protection</a>	1,451 Violations	No. 9 with 1,369 Violations
<b>9. Powered Industrial Trucks (<a href="#">1910.178</a>)</b> • <a href="#">Forklift Safety Training Guide</a>	1,404 Violations	No. 7 with 1,932 Violations
<b>10. Machine Guarding (<a href="#">1910.212</a>)</b> • <a href="#">OSHA Requirements: Machine Guarding</a>	1,105 Violations	No. 10 with 1,313 Violations

# Grain Inspections FY 21 NAICS

- **311211**- Flour milling
- **311212** - Rice milling
- **311119** - Other animal food manufacturing
- **311224** - Soybean & Other Oilseed Processing
- **424510** – Grain & field bean merchant wholesalers
- **493130** – Farm product warehousing and storage

# Top 10 Violations in Grain, Feed and Processing Industry FY21 (Nationwide)

## Most frequently cited OSHA standards during FY 2021 inspections

- |  |  |
|--|--|
| 1. Grain Handling (1910.272)                           | 6. Walking Working Surface – Fall Protection (1910.28)               |
| 2. Lockout/Tagout (1910.147)                           | 7. Personal Protective Equipment (1910.134 - Respiratory Protection) |
| 3. Powered Industrial Trucks (1910.178)                | 8. Permit Required Confined Space (1910.146)                         |
| 4. Mechanical, power transmission apparatus (1910.129) | 9. Wiring Methods, Components (1910.305)                             |
| 5. Machine Guarding (1910.212)                         | 10. Hazard Communication (1910.1200)                                 |

# Top 10 Violations in Grain, Feed and Processing Industry FY21

Standard	# Total Vio	# Serious Vio	# Willful Vio	# Repeat Vio	#Unclassified Vio	# Other Vio	Initial Penalty	Current Penalty
1910.272 – Grain Handling Standard	73	47	12	1	0	13	\$1,493,835.00	\$1,299,648.60
1910.147 – Lockout/Tagout	24	19	0	0	0	5	\$110,475.00	\$84,468.50
1910.178 – Powered Industrial Truck	20	13	0	0	0	7	\$78,699.00	\$48,670.20
1910.219 – Mechanical, Power Transmission	20	17	0	0	0	3	\$77,546.00	\$44,717.20
1910.212 – Machine Guarding	17	16	0	0	0	1	\$113,525.00	\$88,135.50
1910.28 – Fall Protection	16	14	0	0	0	2	\$98,750.00	\$71,305.90
1910.134 – PPE (Respiratory Protection)	15	5	0	0	0	10	\$44,680.00	\$30,137.60
1910.146 – Permit Required Confined Space	15	6	3	0	0	6	\$176,846.00	\$139,120.30
1910.305 - Wiring Methods, Components	8	5	0	0	0	3	\$29,111.00	\$21,553.20
1910.1200 – Hazard Communication	8	0	0	0	0	8	\$5,266.00	\$0.00

# Top Ten Grain Handling Violations – 1910.272 – Federal

Standard	# Total Vio	# Serious Vio	# Willful Vio	# Repeat Vio	#Unclassified Vio	# Other Vio	Initial Penalty	Current Penalty
1910.272(g)(1)(ii) - Deenergize inside bin	10	6	4	0	0	0	\$388,563.00	\$328,259.40
1910.272(g)(3) - Observer outside bin	9	5	3	0	0	1	\$273,037.00	\$258,012.00
1910.272(j)(1) - Housekeeping	7	5	0	0	0	2	\$34,054.00	\$25,674.00
1910.272(g)(1)(i) - Bin entry permit	6	5	1	0	0	0	\$192,387.00	\$144,234.00
1910.272(g)(6) - Don't enter bin under a bridging condition	6	4	2	0	0	0	\$268,558.00	\$255,322.00
1910.272(e)(1) - Annual training	4	0	0	1	0	3	\$10,731.00	\$400.00
1910.272(g)(1)(iii) - Atmospheric testing	4	2	1	0	0	1	\$13,494.00	\$10,120.00
1910.272(e)(1)(ii) - Specific procedures or practices to job task	3	2	0	0	0	1	\$25,588.00	\$13,562.80
1910.272(g)(1)(iv)- Walking down grain	3	2	1	0	0	0	\$150,185.00	\$150,185.00
1910.272(g)(4) - Provide rescue operations	3	3	0	0	0	0	\$24,449.00	\$19,053.00

# Compare FY 20 to FY 21 Citations

## FY20

- 393 Total Violations
  - 272 Serious
  - 13 Willful
  - 1 Repeat
  - 93 Other
- \$2.3 million in total penalties
  - 900k for 1910.272

## FY21

- 284 Total Violations
  - 189 Serious
  - 16 Willful
  - 1 Repeat
  - 78 Other
- \$2.2 million in total penalties
  - \$1.3 million for 1910.272

# NGFA/OSHA Alliance

# NGFA and OSHA Alliance

- Last year, NGFA renewed the cooperative alliance with OSHA, which will allow the grain, feed and processing industry to continue to work more closely and collaboratively with the regulatory agency.
- The new five- year agreement also includes the Grain Elevator and Processing Society (GEAPS) and the Grain Handling Safety Council (GHSC) as signatories.

# Hazards of The Industry

## OSHA Has Determined 6 Major Grain Hazards

- 1 • Engulfments
- 2 • Falls
- 3 • Electric
- 4 • Entanglement
- 5 • Struck by
- 6 • Dust Explosion

# STAND UP GRAIN SAFETY WEEK

April 4 – April 8, 2022

**Small Changes. Big Impact.**



# Rulemaking Priorities in the Biden Administration

# Rulemaking Priorities – Grain Industry

- Emergency Response and Preparedness
- Heat Illness Prevention
- Infectious Disease
- Hazard Communication
- Lockout/Tagout
- Powered Industrial Trucks
- Walking-Working Surfaces
- Injury and Illness Recordkeeping

# Pre-Rule Stage

- Emergency Response and Preparedness

- The primary concern is that whatever requirements are placed upon the ERP, it is certainly going to carry over to organizations that they work with such as grain handling facilities.
- Some examples include: 1) additional paperwork burdens related to preincident planning; 2) responder preparedness e.g. training and certification and facility; and 3) equipment preparedness, to name a few.
- Brian Corderman - Farmers Coop in Enid, Oklahoma, who is also a member of the Safety, Health and Environmental Quality Committee and a volunteer fireman served as a Small Entity Representative on a Small Business Advocacy Review panel convened by OSHA to review the proposed rule. The purpose of the panel is to provide small businesses with a direct voice in addressing the costs of regulations.

# Pre-Rule Stage (cont.)

- Heat Illness Protection for Outdoor and Indoor Work Settings
  - **This is a new proposal under the Biden Administration.**
  - Currently, California, Washington and Minnesota have standards and the House Education and Labor committee has proposed legislation requiring federal OSHA to develop a standard.
  - OSHA's "general duty clause" is designed to protect employees from workplace hazards i.e. heat illness that are not covered by a specific standard.
  - The ANPRM was published on October 26, 2021. Comments are due on January 26.

# Heat Illness Protection for Outdoor and Indoor Work Settings

This ANPRM seeks information on issues that OSHA can consider in developing the standard, including the scope of the standard and the types of controls that might be required. Over 100 questions on the following issues.

- Determinants of Occupational Heat Exposure
  - Heat Exposure
  - Contributions to Heat Stress in the Workplace
- Strategies To Reduce Occupational
  - Heat Related Injury and Illness
  - Heat Injury and Illness Prevention Programs
  - Engineering Controls, Administrative Controls, and Personal Protective Equipment
  - Acclimatization
  - Monitoring
  - Planning and Responding to Heat Related Illness Emergencies
  - Worker Training and Engagement

# Proposed Rule Stage

- Infectious Disease

- In 2010, OSHA began developing a standard to protect health care workers and those in other high risk environments from long standing infectious diseases. Since 2014, there has been no action.
- However, in light of COVID-19 and the ETS there is concern that the agency will now change the scope of the standard to apply to all workplaces in order to prepare for future pandemics.

# Proposed Rule Stage (cont.)

- Hazard Communication

- In 2012 OSHA incorporated the third version of the UN Globally Harmonized System for Labelling (GHS) in the hazard communication standard. However, the GHS is a living document and the UN subcommittee recently approved the eighth version.
- The NGFA submitted comments to the proposed rule that was published in February, along with several other trade groups including the U.S. Chamber of Commerce, to harmonize the existing hazard communication standard with the GHS. A public hearing is scheduled for September 21. There is no date for the publication of a final rule. Primary concern is greater liability for downstream users based on the proposed language.

# Proposed Rule Stage (cont.)

- Lockout/Tagout
  - In 2019 OSHA issued An RFI seeking information regarding two areas where modernizing the Lockout/Tagout standard might better promote worker safety without additional burdens to employers: control circuit type devices and robotics.
  - NGFA signed on to the comments submitted to OSHA by the Coalition for Workplace Safety, a coalition led by the U.S. Chamber of Commerce. The agency plans to publish an NPRM by January 2022.

# Proposed Rule Stage (cont.)

- Powered Industrial Trucks (PITs)
  - In 2019, NGFA submitted comments on OSHA's [RFI](#) seeking feedback from stakeholders regarding the use of PITs for maritime (1915.120, 1917.43, 1918.65) construction, (1926.602(c), (d)), and general industries (1910.178). The agency has now classified this rule as a Long Term Action and a publication date for the proposal has yet to be determined.

# Proposed Rule Stage (cont.)

- Walking Working Surface
  - The agency plans to correct a formatting error in Table D-2 of the existing standard and also revise the language of the requirements for stair rail systems to make them clearer and reflect OSHA's original intent.
- The NPRM was published May 20 and NGFA submitted comments in support of the changes.

# Proposed Rule Stage (cont.)

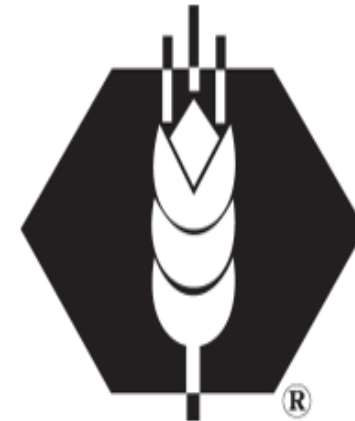
- Improve Tracking of Workplace Injuries and Illnesses
  - **This is a new proposal under the Biden Administration.** OSHA intends to OSHA proposes to amend its recordkeeping regulation to restore the requirement to electronically submit to OSHA information from the OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and OSHA Form 301 (Injury and Illness Incident Report) for establishments with 250 or more employees which are required to routinely keep injury and illness records.
  - Under the current regulation, these establishments are only required to electronically submit information from the OSHA Form 300A (Summary of Work-Related Injuries and Illnesses). The agency plans to publish a proposed rule by December 2021.

# NGFA Resources

# Resources

- NGFA's Safety, Health and Environment Quality Committee has updated the 34-year-old document to encompass industry changes and new technology.
- It is available free of charge to NGFA members on the Safety section of our website.

**NGFA Firefighting Manual  
... A Guide for Operators of Grain  
Handling Facilities and Fire  
Department Officials...**



# SAFETY

The NGFA is committed to promoting safety and health in the workplace, and shares the Occupational Safety and Health Administration's (OSHA's) commitment to protecting employees.

The NGFA's extensive efforts to enhance safety include unprecedented research and education efforts launched in the early 1980s that helped lead to a **dramatic reduction in the number of fire and explosion incidents** in commercial grain-handling facilities in the late 1970s. The industry has demonstrated its commitment, before and after the promulgation of the OSHA's grain handling standard, 29 CFR 1910.272, in 1988.

**Grain Safety Poster:** Save NGFA's "[Grain Bin Safety Saves Lives](#)" document and share your commitment to grain bin safety.

**Businesses can register for OSHA's Safe + Sound Week 2021:** The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) is encouraging businesses and organizations to promote workplace safety and health programs during Safe + Sound Week, Aug. 9-15. NGFA is one of many industry partners supporting Safe + Sound Week, which is an event for employers to implement workplace safety initiatives and highlight workers' contributions to improving safety. Organizations of any size or in any industry looking for an opportunity to showcase their commitment to safety are invited to participate. [Click here](#) to access OSHA's website for information on how to do so.

## Featured Videos



**WATCH: 'Bin Entry Safety' video**

## NGFA Harvest Safety Week



Thank for you participating in NGFA's third annual Harvest Safety Week! Continue to connect with [@ngfa](#) with [#HarvestSafetyWeek](#) on social media! Here's to a safe [#Harvest21](#).

NGFA has several resources designed to help you and your team take important safety precautions during a busy harvest. Some of them are highlighted below:

### New Video

[Transforming Workplace Safety Culture](#) - A conversation hosted by [People Spark Consulting](#)

### New Podcasts

[Dryer Operations](#)  
[Critical Pieces of Equipment](#)  
[Struck-By Hazards](#)  
[Bin Harvest Prep](#)

### Safety Tips Sheets

[Dryer Fire Prevention](#)  
[Vehicle Struck-By](#)  
[Dust Suppression Techniques](#)  
[Quality Control](#)

### Guidance Documents

[Firefighting Manual \(updated 2021\)](#)

### Videos

[Combustible Dust Safety](#)



# CONVEY '21

July 13-14 | Omaha Hilton | Omaha NE

In-Person | Trade Show | Education Sessions

Presented by National Grain and Feed Assn., Grain Elevator and Processing Society, and Grain Journal

Mark Your Calendar for CONVEY '22 | July 26-27, 2022 | Omaha Hilton | Omaha, NE

## PROGRAM

Considerations in Retrofitting a Facility After an Incident

# Thank You

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