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The Occupational Safety and Health Act of 1970 (OSH Act): A Legal Overview

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SUMMARY

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The Occupational Safety and Health Act of 1970 (OSH Act): A Legal Overview

Congress enacted the Occupational Safety and Health Act (OSH Act or Act) in 1970 "to assure safe and healthful working conditions for working men and women." The Act created the Occupational Safety and Health Administration (OSHA) within the Department of Labor and granted OSHA the authority to establish occupational safety and health standards across the United States. To accomplish this purpose, the Act provided detailed processes for OSHA to develop, promulgate, and enforce regulations directed at providing safe and healthy workplaces. This report provides an overview of the Act and examines select legal issues.

The OSH Act's coverage extends to private workplaces in all fifty states, the District of Columbia, Puerto Rico, and other territories and jurisdictions under federal authority. The Act generally covers all employers with at least one employee that are engaged in business affecting interstate commerce. A covered employer must comply with two central provisions: (1) to provide a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm, and (2) to follow OSHA standards and rules.

The Act provides the Secretary of Labor (Secretary) the authority to promulgate permanent occupational safety and health standards and emergency temporary standards necessary to protect employees from grave danger. OSHA's standards set a nationwide floor for policies protecting workers from unsafe or unhealthy circumstances that they may encounter in the workplace, and such standards generally preempt state law. To enforce its requirements, the Act provides the Secretary the authority to issue civil or criminal penalties upon a finding of a violation under the Act. OSHA standards, both permanent and temporary, are commonly the subjects of legal challenges contesting the agency's actions and authority to regulate workplaces.

States may also choose to establish their own OSHA plans subject to the approval of the Secretary, which must be "at least as effective in providing safe and healthful employment and places of employment" as federal OSHA standards. The OSH Act expressly excludes federal, state, and local government employers from coverage. However, a state OSHA plan adopted pursuant to the Act's requirements may cover state and local government workers as well as private sector workers within that state. Federal agencies must also have safety and health programs consistent with the standards set by OSHA.

OSHA's regulatory power as authorized by Congress has been upheld by the U.S. Supreme Court, and the Court in the 2024 term declined to take up a challenge to the constitutionality of the OSH Act's delegation of authority to OSHA in *Allstates Refractory Contractors, LLC v. Su*. At the same time, the Court has also recently recognized limitations to OSHA's authority, such as in the area of emergency temporary standards addressing the spread of COVID-19 in *National Federation of Independent Business v. OSHA*. Grants of authority to agencies generally may also be reexamined in the wake of the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo.* This report concludes with some considerations for Congress in light of these developments.

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Background

Prior to the enactment of the Occupational Safety and Health Act (OSH Act or Act), states were chiefly responsible for enacting and implementing the majority of legislation that was targeted at preventing workplace accidents and illnesses.[1] While federal efforts to address workplace safety increased over time, federal legislation through the early 20th century primarily addressed aspects of workplace safety within specific industries (e.g., factories and coal mines, where major incidents with fatalities garnered national attention) and organized labor.[2]

In 1970, Congress enacted the OSH Act, also referred to as the "Williams-Steiger Act," creating within the Department of Labor the Occupational Safety and Health Administration (OSHA) and a process for promulgating and enforcing occupational safety and health standards nationwide and across all industries.[3] The Senate report of the Committee on Labor and Public Welfare commenting on an early version of the Act indicates Congress's view at the time of evolving occupational health threats from "the chemical and physical hazards which characterize modern industry."[4] For example, the report cited the former Secretary of Labor's testimony that the number of disabling workplace injuries was 20% higher in 1970 than in 1958 and that "during the past four years more Americans have been killed where they work than in the Vietnam War."[5] Congress also expressed concern over the impact that workplace injuries and deaths had on the larger economy.[6] Accordingly, Congress designed the OSH Act's regulatory scheme "to assure as far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[7]

To achieve this objective, the Act assigns distinct regulatory tasks to two administrative actors: the Secretary of Labor (Secretary), who is charged with creating and enforcing occupational

[1] *See* MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW, § 1:1 Pre–OSHA history (2022 ed.) ("Legislative interest in the area of industrial safety began at the state level. In 1877, Massachusetts passed a work safety statute requiring the guarding of hazardous parts of machinery, such as shafts and gears. By 1890, 21 states had passed occupational safety and health laws, and by 1920, nearly every state had an industrial safety law. Unfortunately, these laws were usually more cosmetic than they were substantive.... At the federal level there was little meaningful activity during this period.").

[2] *See, e.g.*, Railway Labor Act, Pub. L. No. 69-257, 44 Stat. 582, 45 U.S.C. §§ 151–188 (1926) (regulating labor relations in the railway industry); National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449, 29 U.S.C. §§ 151–169 (1935) (establishing rights of certain employees to organize and creating the National Labor Relations Board; also known as the Wagner Act); Walsh–Healey Public Contracts Act, Pub. L. No. 74-846, 49 Stat. 2036, 41 U.S.C. §§ 6501–6511 (1936) (establishing child labor prohibitions and minimum standards in the manufacturing industry); Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, 30 U.S.C. §§ 801 et seq. (establishing health and safety standards for mines; also known as the Coal Act).

[3] Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 29 U.S.C. §§ 651–678.

[4] S.REP. NO. 91–1282 at 4–5 (Oct. 5, 1970) (quoting Pres. Richard Nixon, Special Message to the Congress on Occupational Safety and Health (Aug. 6, 1969) ("The side effects of progress present special dangers in the workplaces of our country. For the working man and woman, the by-products of change constitute an especially serious threat. Some efforts to protect the safety and health of the American worker have been made in the past both by private industry and by all levels of government. But new techniques have moved even faster to create newer dangers. Today we are asking workers to perform far different tasks from those they performed five or fifteen or fifty years ago. It is only right that the protection we give them is also up to date.").

[5] *Id.* at 2.

[6] *See* 29 U.S.C. § 651(a). The OSH Act begins with a congressional statement of findings and declaration of purpose and policy that "[t]he Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments."

[7] *Id.* at § 651(b).

health and safety standards; and the Occupational Safety and Health Review Commission (OSHRC or Commission), a three-member board, appointed by the President with the advice and consent of the Senate, that carries out adjudicatory functions.[8] This regulatory scheme works in tandem with the Act's imposition of a general duty for employers to eliminate "avoidable hazards to the life, limb or health of his workers."[9] As one court described in a seminal case soon after the Act's passage, "Though novel in approach and sweeping in coverage, the legislation is no more drastic than the problem it aims to meet."[10]

Constitutional Authority

Congress may act only pursuant to its enumerated powers.[11] In Section 2 of the OSH Act, Congress declared its constitutional authority to be "the exercise of its powers to regulate commerce among the several states and foreign nations and to provide for the general welfare."[12] The Commerce Clause in Article I, Section 8, clause 3, states that Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"[13] The Supreme Court has interpreted the "interstate commerce" power to regulate commerce "among the several States" as an authority to regulate the use of the channels of interstate commerce, to protect instrumentalities of interstate commerce, and to regulate activities that substantially affect interstate commerce.[14] Congress's reference in the OSH Act to the "general welfare" refers to the Spending Power in Article I, Section 8, clause 1, authorizing Congress to provide for the "general Welfare of the United States[.]"[15]

The Act refers to Congress's commerce power in several sections. Congress observed that injuries and illnesses arising out of workplace incidents impose "a substantial burden on interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments."[16] Section 2 of the Act lists the means by which the OSH Act accomplishes Congress's purpose of assuring safe and healthy working conditions. Among these means, the Act

[8] *See* Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 147 (1991).

[9] Nat'l Realty & Constr. Co. v. Occupational Safety & Health Rev. Comm'n, 489 F.2d 1257, 1260 (D.C. Cir. 1973).

[10] *See id.* at 1260–61. Section 2 of the Act lists thirteen means by which OSHA accomplishes Congress's policy and purpose, including by providing for the development and promulgation of occupational safety and health standards; by providing an effective enforcement program that shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition; and by encouraging the states to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the states to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of state occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith. *See generally*, 29 U.S.C. § 651(b).

[11] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States.").

[12] *See* 29 U.S.C. § 651(b).

[13] U.S. CONST. art. I, § 8, cl. 3; *see also* Cong. Rsch. Serv., *Meaning of Commerce*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C3-2/ALDE_00013404/ (last visited Nov. 15, 2024).

[14] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536–37 (2012) (citing United States v. Morrison, 529 U.S. 598, 609 (2012)).

For additional information on Congress's authority to regulate interstate commerce, consult CRS In Focus IF11971, *Congress's Authority to Regulate Interstate Commerce*, by Michael A. Foster and Erin H. Ward.

[15] U.S. CONST. art. I, § 8, cl. 1; *see also* Cong. Rsch. Serv., *Overview of Spending Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C1-2-1/ALDE_00013356/ (last visited Nov. 15, 2024).

[16] 29 U.S.C. § 651(a).

"authorizes the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce."[17] Courts have interpreted Congress's intent in enacting the OSH Act as exercising the full range of the authority granted by the commerce clause of the Constitution.[18] Therefore, a business falls within OSHA's statutory jurisdiction by merely "affecting commerce," and it is not necessary that the employer be engaged directly in interstate commerce.[19] However, if an employer challenges an action by OSHA, the burden of showing that the employing business's activities affect interstate commerce is on the government.[20]

Some decisions have examined whether Congress's delegation of authority to OSHA to set workplace safety standards is constitutional. For example, the U.S. Court of Appeals for the Sixth Circuit rejected challenges to OSHA's authority under the nondelegation doctrine in a 2023 decision.[21] To uphold a delegation by Congress to a governmental entity, the Supreme Court has established a fairly lenient test: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[22] Joining sister circuits in holding that the OSH Act's authorization to the Secretary to promulgate "reasonably necessary or appropriate"[23] workplace safety standards is an "intelligible principle," the Sixth Circuit reasoned that the Act sets forth "a host of principles, purposes, and goals" and "significantly limits OSHA's discretion" in deciding whether it may issue a particular standard.[24] In summarizing its decision, the court stated that "the OSH Act provides an overarching framework to guide OSHA's discretion, and the Act's standards comfortably fall within those limits previously upheld by the Supreme Court."[25]

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[17] 29 U.S.C. § 651(b)(3). Section 3 of the Act defines "commerce" to mean "trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof." 29 U.S.C. § 652(3). As discussed below, the Act defines an "employer" as "a person engaged in a business affecting commerce who has employees" and an "employee" as "an employee of an employer who is employed in a business of his employer which affects commerce." *Id.* § 652(5), (6).

[18] *See, e.g.*, Godwin v. Occupational Safety & Health Rev. Comm'n, 540 F.2d 1013 (9th Cir. 1976); United States v. Dye Construction Co., 510 F.2d 78 (10th Cir. 1975); Brennan v. Occupational Safety & Health Rev. Comm'n, 492 F.2d 1027 (2d Cir. 1974).

[19] *See Godwin*, 549 F.2d at 1015–16 (citing Wickard v. Filburn, 317 U.S. 111 (1942)).

[20] *See* Austin Road Co. v. Occupational Safety & Health Rev. Comm'n, 683 F.2d 905, 907 (5th Cir. 1982) (acknowledging that while the "burden [on the government] is, in the usual case, modest, if indeed not light," the administrative law judge's (ALJ) findings of a contractor's profits affecting a corporate parent and siblings were insufficiently supported by the record to establish jurisdiction and were "speculative and conclusionary"). *But see* Chao v. Occupational Safety and Health Rev. Comm'n, 401 F.3d 355, 364 (5th Cir. 2005) (holding that the Secretary met the "modest jurisdictional burden" by presenting evidence that a contractor's asbestos removal activities affected interstate commerce by depriving other commercial asbestos abatement firms of the opportunity to perform the work at the site).

[21] Allstates Refractory Contractors, LLC v. Su, 79 F.4th 755 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 2490 (2024).

[22] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[23] As discussed in more detail below in the discussion of standards, Section 6 of the OSH Act authorizes the Secretary to "promulgate, modify, or revoke any occupational safety or health standard." 29 U.S.C. § 655(b). The Act further defines "occupational safety and health standard" to mean "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, *reasonably necessary or appropriate* to provide safe or healthful employment and places of employment." *Id.* at § 652(8) (emphasis added).

[24] *Allstates Refractory Contractors, LLC*, 79 F.4th at 764. *See also* Nat'l Mar. Safety Ass'n v. Occupational Safety & Health Admin., 649 F.3d 743, 755 (D.C. Cir. 2011); Blocksom & Co. v. Marshall, 582 F.2d 1122, 1125 (7th Cir. 1978).

[25] *Allstates Refractory Contractors, LLC*, 79 F.4th at 768. The majority also distinguished the OSH Act from the two occasions in which the Supreme Court held an act violated the nondelegation doctrine, Panama Refin. Co. v. Ryan, 293 (continued...)

Other recent cases have identified some limits to OSHA's authority as construed in the OSH Act. For example, in 2022, the Supreme Court stayed the enforcement of OSHA's COVID-19 vaccination and testing emergency temporary standard (ETS) for employers with 100 or more employees.[26] The Court concluded that the applicants were likely to succeed on the merits of their claim that OSHA lacks the statutory authority to issue such a standard because the OSH Act empowers the agency to establish workplace safety standards rather than "broad public health measures."[27] However, the per curiam decision did not address whether Congress's delegation of authority to OSHA generally raised constitutional concerns.[28]

Coverage

Employers

The OSH Act, as stated in Section 4, applies to employers in all fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and other territories and jurisdictions under federal authority.[29] Any employer with at least one employee may be covered by the Act.[30] The Act defines "employer" in Section 3(5) as "a person engaged in a business affecting commerce who has employees, but does not include the United States [] or any State or political subdivision of a State."[31] As discussed in the section above, courts have construed broadly whether an employer is "engaged in a business affecting commerce."[32] A "person" within the employer definition includes but is not limited to "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of

U.S. 388 (1935) and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), as cases involving "a delegation with *no* standards" and a "virtually unfettered" delegation to the executive, respectively. *See id.* at 767.

[26] *See* Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 595 U.S. 109 (2022). For additional discussion of this case, consult the chapter on ETS in this report.

[27] *See id.* at 118 ("Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.").

[28] In a concurring opinion, Justice Neil Gorsuch, joined by Justices Clarence Thomas and Samuel Alito, explicitly characterized the ETS as defying the "major questions" doctrine. The Court has previously explained that, under this doctrine, Congress must speak clearly when authorizing an agency to regulate matters of significant economic and political significance. Justice Gorsuch contended that OSHA sought to resolve a "question of vast national significance" when it issued the ETS and that Congress "nowhere clearly assigned so much power to OSHA." *See id.* at 121 (Gorsuch, J., concurring). For discussion of the major questions doctrine, see CRS Legal Sidebar LSB10745, *The Supreme Court's "Major Questions" Doctrine: Background and Recent Developments*, by Kate R. Bowers and Daniel J. Sheffner (2022).

[29] 29 U.S.C. § 653(a) ("This chapter shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Lake Island, Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.], Johnston Island, and the Canal Zone. The Secretary of the Interior shall, by regulation, provide for judicial enforcement of this chapter by the courts established for areas in which there are no United States district courts having jurisdiction.").

[30] 29 C.F.R. § 1975.4(a) (1972) ("Any employer employing one or more employees would be an 'employer engaged in a business affecting commerce who has employees' and, therefore, he is covered by the Act as such.").

[31] 29 U.S.C. § 652(5).

[32] *See also* Usury v. Lacy, 628 F.2d 1226 (9th Cir. 1980) (holding that an apartment property owner who hired 40 workers for construction was covered by the OSH Act because he used tools and materials supplied by interstate manufacturers).

persons."[33] Whether a "person" is an employer has also been interpreted to include joint ventures.[34]

Coverage under the OSH Act may reach multiple employers on the same worksite.[35] However, some persons have been held not to be "employers" subject to the OSH Act in relation to certain employees—such as an owner-builder in relation to independent contractors on his own property[36] and "manufacturers, producers, installers, and retailers of machinery equipment and/or chemicals" used by a corporation.[37] Courts have also held that parent companies were not liable under the OSH Act for workplace safety violations by subsidiaries where the parent did not exercise direct control over the subsidiaries' employees.[38]

As a matter of policy, some employers are exempted from OSHA requirements despite coverage under the Act.[39] For example, Congress exempts small farms with ten or fewer employees from OSHA enforcement in the agency's annual appropriations.[40] Congress also exempts from enforcement certain small businesses with ten or fewer employees in low-hazard industries.[41] Companies that have ten or fewer employers are also exempted from certain recordkeeping

[33] 29 U.S.C. § 652(4). Other entities such as joint ventures have also been held to be employers despite their absence from the list. *See* Bloomfield Mech. Contracting, Inc. v. Occupational Safety & Health Rev. Comm'n, 519 F.2d 1257, 1261 (3d Cir. 1975).

[34] *See Bloomfield Mechanical Contracting, Inc*., 519 F.2d at 1261 ("There is no question that a joint venture is an employer within the meaning of the [OSH] Act.").

[35] *See* Universal Const. Co. v. Occupational Safety & Health Rev. Comm'n, 182 F.3d 726, 728 (10th Cir. 1999) ("multi-employer doctrine provides that an employer who controls or creates a worksite safety hazard may be liable under the Occupational Safety and Health Act even if the employees threatened by the hazard are solely employees of another employer").

[36] *See* Lynch v. Reed, 944 P.2d 218 (1997) (holding that a cabin owner-builder was not an "employer" subject to OSHA, where one person who assisted in construction had merely agreed to come to the cabin site to help with erection of the cabin and the other workers on site were independent contractors).

[37] *See* Johnson v. Koppers Co., Inc., 524 F. Supp. 1182, 1189 (N.D. Ohio 1981)).

[38] *See* United States v. MYR Grp., Inc., 361 F.3d 364, 366 (7th Cir. 2004) (distinguishing a case dealing with a parent company and subsidiary from multi-employer precedents applied to the construction industry, where contractors required by OSHA regulations to provide safe workplaces for their own workers also assume duties to other workers at the same site).

[39] *See* ROTHSTEIN, *supra* note 1, at § 2:6. Covered employers—Congressional exemptions.

[40] *See, e.g.*, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, tit. 1, 136 Stat. 4459, 4844 ("Provided further, That none of the funds appropriated under this paragraph shall be obligated or expended to prescribe, issue, administer, or enforce any standard, rule, regulation, or order under the Act which is applicable to any person who is engaged in a farming operation which does not maintain a temporary labor camp and employs 10 or fewer employees.").

[41] *See id.* ("Provided further, That no funds appropriated under this paragraph shall be obligated or expended to administer or enforce any standard, rule, regulation, or order under the Act with respect to any employer of 10 or fewer employees who is included within a category having a Days Away, Restricted, or Transferred ("DART") occupational injury and illness rate, at the most precise industrial classification code for which such data are published, less than the national average rate as such rates are most recently published by the Secretary … except— (1) to provide, as authorized by the Act, consultation, technical assistance, educational and training services, and to conduct surveys and studies; (2) to conduct an inspection or investigation in response to an employee complaint, to issue a citation for violations found during such inspection, and to assess a penalty for violations which are not corrected within a reasonable abatement period and for any willful violations found; (3) to take any action authorized by the Act with respect to imminent dangers; (4) to take any action authorized by the Act with respect to health hazards; (5) to take any action authorized by the Act with respect to a report of an employment accident which is fatal to one or more employees or which results in hospitalization of two or more employees, and to take any action pursuant to such investigation authorized by the Act; (6) to take any action authorized by the Act with respect to complaints of discrimination against employees for exercising rights under the Act").

requirements.[42] Individuals who privately employ persons in their own residences for house cleaning, cooking, and childcare are not subject to the requirements of the Act.[43] Nonprofits, charitable organizations, churches, and religious organizations are considered employers, but OSHA does not consider individuals in "the performance of, or participation in, religious services (as distinguished from secular or proprietary activities whether for charitable or religion-related purposes)" to be employees under the Act.[44]

While Section 3(5) excludes the United States from the definition of "employer," Section 19(a) requires the head of each federal agency (not including the U.S. Postal Service) to establish, develop, and maintain a comprehensive occupational safety and health program "consistent" with standards set by OSHA.[45] This provision effectively applies OSHA-consistent standards to the workplaces of federal agency employees. The Congressional Accountability Act and the Presidential and Executive Office Accountability Act apply OSHA's requirements to workplaces in the legislative branch and executive offices, respectively.[46]

The OSH Act may not cover employers whose workplace safety is already regulated by other federal agencies.[47] Section 4(b) of the Act states that nothing in the Act shall apply to "working conditions of employees with respect to which other Federal agencies … exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."[48] However, as the Supreme Court has clarified, "mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction."[49] When considering whether OSHA's authority is preempted by the workplace safety standards of another federal agency, the Commission looks to whether the employer is covered by another federal law directed at workplace safety or health and whether the other federal agency has exercised its statutory grant of authority in such a manner as to exempt the cited working conditions from OSHA jurisdiction.[50] Even where another federal agency has exercised authority over workplace safety—such as the Federal Railroad Administration and railway safety, for example—the industry regulated by that agency may not be exempt from all

[42] *See* 29 C.F.R. § 1904.1 (2001) ("If your company had 10 or fewer employees at all times during the last calendar year, you do not need to keep OSHA injury and illness records unless OSHA or the Bureau of Labor Statistics informs you in writing that you must keep records under § 1904.41 or § 1904.42.").

[43] *Id.* at 1975.6.

[44] *See id.* at 1975.4. OSHA, citing the Religious Freedom Restoration Act, has also provided exemptions to workplace safety requirements in order to accommodate religious practices, such as wearing religious clothing. *See* Letter from Thomas Galassi, Dir. of Enforcement Programs, Occupational Safety & Health Admin., to Sikh American Legal Defense and Education Fund (Aug. 5, 2011), https://www.osha.gov/laws-regs/standardinterpretations/2011-08-05.

[45] 29 U.S.C. § 668. In 1998, Congress enacted the Postal Employees Safety Enhancement Act, Pub. L. No. 105-241, 112 Stat. 1572 (1998), amending the OSH Act to cover the U.S. Postal Service in the same manner as a private employer.

[46] *See* 2 U.S.C. § 1302; 3 U.S.C. § 402. While the OSH Act does not convey OSHA oversight authority over the legislative and judicial branches of government, OSHA can, upon request or agreement, provide assistance or consultation with other branches of government to help them implement safety and health programs. *See Field Operations Manual, Chapter 13: Federal Agency Field Activities*, OSHA, U.S. DEP'T OF LABOR, https://www.osha.gov/enforcement/directives/cpl-02-00-163/chapter-13 (last visited Dec. 2, 2024).

[47] *See* Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235, 241 (2002).

[48] 29 U.S.C. § 653(b)(1).

[49] *Mallard Bay Drilling, Inc.* 534 U.S. at 241–42.

[50] *See, e.g.*, Sec'y of Lab. v. BME & Sons, Inc., 23 BNA OSHC 1731 at *5 (No. 10-0248, 2011) (holding that Navy safety guideline for construction work is "not codified, and as such, is not 'statutory authority'" sufficient to preempt OSHA regulations).

OSHA requirements.[51] In areas where there is potential overlap, OSHA has also entered into memoranda of understanding with other federal agencies that clarify when OSHA's jurisdiction is preempted, such as with the Department of Energy, the Environmental Protection Agency, the Mine Safety and Health Administration, and others.[52]

The Act explicitly excludes state and local governments from the definition of "employer" under the Act.[53] Unlike federal agencies, they do not have a requirement to maintain occupational safety and health programs consistent with OSHA. However, as discussed below in the section on state plans, state governments that have adopted state plans under OSHA may be covered under their own programs, which must be "at least as effective" as federal OSHA requirements.[54]

Employees

An "employee" under the OSH Act is somewhat circularly defined as "an employee of an employer who is employed in a business of his employer which affects commerce."[55] Legal commentators have stated that "[t]o give the Act the widest possible coverage, common law, contractual, and other statutory concepts of 'employee' have been rejected by the Commission" in finding that "all persons performing work for an employer are considered employees and therefore are entitled to protection under the Act."[56] Therefore, unlike some other federal labor and employment statutes, employees covered by the OSH Act include supervisors and other senior positions.[57] However, the Secretary has the burden of proving that workers are "employees" of the purported employer at issue.[58]

In determining whether an individual is an employee or an independent contractor, the Commission primarily relies on the common law test for employment articulated by the Supreme Court in *Nationwide Mutual Insurance Co v. Darden*, which focuses on "the hiring party's right to control the manner and means by which the product is accomplished."[59] In applying the test, the Commission may consider several factors, including the skill of the work required, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the

[51] *See* Consolidated Rail Corp., 10 BNA OSHC 1706 (No. 80-3495, 1982) ("Although the [Federal Railroad Administration] has the statutory authority to regulate the safety of railroad industry employees, *see* 45 U.S.C. §§ 421, 431, the entire railroad industry is not exempt from OSHA enforcement.").

[52] *See* Memoranda of Understanding, OSHA, U.S. DEP'T OF LAB., https://www.osha.gov/laws-regs/mou/agency (last visited Nov. 15, 2024).

[53] 29 U.S.C. § 652(5).

[54] *See id.* § 667.

[55] *Id.* § 652(6). *See also* Slingluff v. Occupational Safety & Health Rev. Comm'n, 425 F.3d 861, 867 (10th Cir. 2005) ("This circular definition [of 'employee'] is not helpful, so the Commission has adopted standards for determining who is an employee under the Act that are consistent with a Supreme Court case holding that the term 'employee' in a federal statute should be interpreted under common law principles unless the particular statute specifically indicates otherwise.").

[56] *See* MARK A. ROTHSTEIN, WEST'S FEDERAL ADMINISTRATIVE PRACTICE, OCCUPATIONAL SAFETY AND HEALTH ACT, § 2606. To whom is a duty owed? (2024 ed.).

[57] *See* Sec'y of Labor v. FEC, Inc., 1 BNA OSHC 3043 at *5 (No. 17, 1972). The National Labor Relations Act, for example, does not include "supervisors" as employees covered by the Act. 29 U.S.C. § 152(3). The Fair Labor Standards Act provides an exemption from both minimum wage and overtime pay for individuals employed as bona fide executive, administrative, professional employees. 29 U.S.C. § 213(a)(1).

[58] Sec'y of Labor v. All Star Realty Co., Inc., 24 BNA OSHC 1356 at *2 (No. 12-1597, 2014).

[59] 503 U.S. 323 (1992).

regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits, and the tax treatment of the hired party.[60] However, the central inquiry is whether the purported employer controls the work environment.[61] Thus, the OSH Act may impose duties on employers toward workers other than their employees in limited contexts, such as in cases where building owners owe duties to contractors on a building site.[62]

While the OSH Act is agency-driven and primarily focused on the obligations of employers, the Act grants some rights to employees in enforcing the Act's requirements.[63] For example, Section 11(c) provides employees whistleblower protections against retributory treatment for exercising their rights under the Act.[64] If an employee believes that he or she has been discharged or discriminated against in violation of this provision, the employee may file a complaint with the Secretary within thirty days of the incident.[65] Section 13(d) also authorizes a limited private right of action against OSHA by employees "if the Secretary arbitrarily or capriciously fails to seek relief[.]"[66]

General Duty Clause

Employers have a general duty to ensure their employees' health and safety under the OSH Act. Section 5(a)(1) states that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]"[67] This provision, known as the general duty clause, provides a source of federal workplace protections even in the absence of the standards or regulations issued by OSHA.[68]

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[60] *See* Sec'y of Labor v. FM Home Improvement, 22 BNA OSHC 1531 at *7–9 (No. 08-0452, 2009).

[61] Loomis Cabinet Co. v. OSHRC, 20 F.3d 938, 942 (9th Cir. 1994). Courts and the Commission at times also look to the "economic realities" of the relationship between the purported employer and employee to determine whether an employment relationship exists. *See id.* at 941–42.

[62] *See* Sec'y of Lab. v. Trinity Indus., Inc., 504 F.3d 397, 402 (3d Cir. 2007) ("Although *Nationwide Mutual Insurance Co.* stands for the proposition that 'employee' should be given its common law 'master-servant' definition, that case was decided under ERISA and has no impact on the question of whether the scope of the OSH Act is broad enough to cover workers who are not employees under the common law definition. Courts have frequently ruled that the OSH Act, and the regulations promulgated thereunder, sweep broadly enough so as to allow the Secretary to impose duties on employers to persons other than their employees." (citing Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992)).

[63] *See* ROTHSTEIN, *supra* note 1, at § 9:1. Employee rights—generally (discussing various rights of employees under the Act such as petitioning for adoption of a standard, filing a complaint with OSHA, and participating in an inspection tour).

[64] 29 U.S.C. 660(c)(1) ("No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.").

[65] *Id.* § 660(c)(2).

[66] *Id.* § 662(d). *See also* Doe I v. Scalia, 58 F.4th 708, 714–16 (3d Cir. 2023) (rejecting argument that the Act authorizes employee-driven relief after OSHA has completed its enforcement proceedings).

[67] 29 U.S.C. § 654(a)(1).

[68] *See* SeaWorld of Fla., LLC v. Perez, 748 F.3d 1202, 1207 (D.C. Cir. 2014) (quoting the House Committee on Education and Labor that the general duty clause "enables the Federal Government to provide for the protection of employees who are working under such *unique* circumstances that no standard has yet been enacted to cover this situation"). *See also* Letter from Richard E. Fairfax, Dir. of Enforcement Programs, Occupational Safety & Health Admin., to Milan Racic, Health & Safety Specialist, Int'l Bhd. of Boilermakers (Dec. 18, 2003), https://www.osha.gov/laws-regs/standardinterpretations/2003-12-18-1 ("The General Duty Clause is used only where there is no standard that applies to the particular hazard.").

To prove a violation of the general duty clause, the Secretary must establish that (1) an activity or condition in the employer's workplace presented a hazard to an employee, (2) either the employer or the industry recognized the condition or activity as a hazard, (3) the hazard was likely to or actually caused death or serious physical harm, and (4) a feasible means to eliminate or materially reduce the hazard existed.[69] Courts have interpreted the general duty clause's requirement that places of employment be free from recognized hazards to be "unqualified and absolute" while also recognizing that the duty must be "achievable" to workplaces.[70]

The question of whether an activity or condition in the workplace presented a preventable hazard may be complex and particular to an industry.[71] For example, exposure to fire may be a hazard that emergency responders such as firefighters are exposed to in the course of their duties, while exposure to fire in the majority of professions would be an unusual condition that suggests a hazard may have been present. Evidence of a hazard in the workplace may be demonstrated by an incident resulting in illness, injury, or death, but the mere existence of such incidents, although relevant, is not conclusive to finding a violation.[72] A related inquiry to the hazard's existence is whether a condition is "recognized" as a hazard by the employer or in the industry.[73] If the employer had actual knowledge that the hazard existed, the element may be met, and constructive knowledge may be proven through evidence that a reasonably prudent person familiar with the circumstances of the industry would have known of the hazard.[74]

To prove a general duty clause violation, a hazard must have also actually caused or been likely to cause death or serious physical harm.[75] The relevant inquiry is not whether the hazard was a proximate cause of death or injury in a particular case but the risk and seriousness of accident or injury as a result of the alleged violations.[76] An incident need not occur for this element to be met,

[69] *See, e.g.*, Fabi Constr. Co. v. Sec'y of Lab., 508 F.3d 1077, 1081 (D.C. Cir. 2007) (quoting L.R. Willson & Sons, Inc. v. Occupational Safety & Health Rev. Comm'n, 698 F.2d 507, 513 (D.C. Cir. 1983)) ("In other words, 'the Secretary must prove that a reasonably prudent employer familiar with the circumstances of the industry would have protected against the hazard in the manner specified by the Secretary's citation.'").

[70] *SeaWorld of Fla., LLC*, 748 F.3d at 1207 (citing Nat'l Realty & Constr. Co. v. Occupational Safety & Health Rev. Comm'n, 489 F.2d 1257, 1265–66 (D.C. Cir. 1973)).

[71] *See Nat'l Realty & Constr. Co.*, 489 F.2d at 1266 ("A hazard consisting of conduct by employees, such as equipment riding, cannot, however, be totally eliminated. A demented, suicidal, or willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced safety regime. This seeming dilemma is, however, soluble within the literal structure of the general duty clause. Congress intended to require elimination only of preventable hazards. It follows, we think, that Congress did not intend unpreventable hazards to be considered 'recognized' under the clause. Though a generic form of hazardous conduct, such as equipment riding, may be 'recognized,' unpreventable instances of it are not, and thus the possibility of their occurrence at a workplace is not inconsistent with the workplace being 'free' of recognized hazards.").

[72] *See id.*

[73] *Id.* at 1265 n.32 ("An activity may be a 'recognized hazard' even if the defendant employer is ignorant of the activity's existence or its potential for harm. The term received a concise definition in a floor speech by Representative Daniels when he proposed an amendment which became the present version of the general duty clause: 'A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a hazard is 'recognized' is a matter for objective determination; it does not depend on whether the particular employer is aware of it.'").

[74] Donovan v. Gen. Motors Corp., 764 F.2d 32, 37 (1st Cir. 1985). Furthermore, where a hazard is obvious and glaring, the Commission may determine that a hazard is recognized for purposes of the general duty clause, without reference to industry practice or safety expert testimony. *See* Tri-State Roofing & Sheet Metal, Inc. v. Occupational Safety & Health Rev. Comm'n, 685 F.2d 878, 880 (4th Cir. 1982).

[75] *See Fabi Constr. Co.* 508 F.3d at 1081.

[76] Dye Const. Co. v. Occupational Safety & Health Rev. Comm'n, 698 F.2d 423, 426 (10th Cir. 1983).

nor is its existence conclusive of a violation.[77] However, the fact of an incident resulting in injury occurring may be "at least prima facie evidence of likelihood [of injury] and the rest may be supplied to common sense or understanding of physical law."[78]

Finally, an employer who commits a general duty clause violation must have had the ability to have feasibly eliminated or materially reduced the existence of the hazard.[79] Therefore, the Commission would look to whether it was "feasible" for an employer to abate a hazard.[80] In professions that are recognized as particularly hazardous, the inquiry of whether an employer could have done anything to eliminate or materially reduce a hazard may not rest on whether employees were exposed to the hazard but, based on the nature of the work, whether an employer could have taken feasible steps to eliminate or reduce the hazard.[81] When an employer has existing safety procedures, the burden is on the Secretary to prove that those procedures were inadequate to address the hazard.[82]

OSHA Standards

Section 5 of the OSH Act imposes a duty on employers to "comply with occupational safety and health standards promulgated under [the] Act."[83] The Act defines occupational safety and health standards as those requiring "conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[84] The Act does not identify and prohibit specific employment practices in the model of federal statutes such as the National Labor Relations Act.[85] Instead, the OSH Act authorizes the Secretary of Labor to promulgate workplace safety and health standards, specifies the procedures for the Secretary to follow in formulating these standards, and provides for enforcement mechanisms.

Section 6 of the Act provides three methods for the Secretary to follow in order to promulgate standards.[86] First, the Act authorized the Secretary to adopt existing federal standards and national consensus standards within two years of the statute's effective date.[87] Second, under Section 6(b),

[77] *See* Titanium Metals Corp. of Am. v. Usery, 579 F.2d 536, 542 (9th Cir. 1978).

[78] Illinois Power Co. v. Occupational Safety & Health Rev. Comm'n, 632 F.2d 25, 28 (7th Cir. 1980).

[79] *See Fabi Constr. Co.* 508 F.3d at 1082–83 (upholding the Commission's finding that defendants failed to utilize a feasible method of abatement by following the industry practice of consulting a structural engineer).

[80] *Id. See also* Champlin Petroleum Co. v. OSHRC, 593 F.2d 637, 640 (5th Cir. 1979) ("The general duty obligation, however, is not designed to impose absolute liability or respondeat superior liability for employees' negligence. Rather it requires the employer to eliminate only 'feasibly preventable' hazards.").

[81] *See SeaWorld of Fla., LLC*, 748 F.3d at 1207 (finding a violation of the general duty clause after an aquatic amusement park whale attack); *but see* Patterson-Uti Drilling Co. LLC, & Its Successors, Respondent., 2021 O.S.H.D. (CCH) ¶ 33842 (No. 18-1204, 2021) (ALJ) (finding no general duty clause violation after an oil rig explosion).

[82] *See SeaWorld of Fla., LLC*, 748 F.3d at 1207. *See also* BHC Norwest Psychiatric Hosp., LLC v. Sec'y of Labor, 951 F.3d 558, 565 (D.C. Cir. 2020) (holding that the Secretary showed that a psychiatric hospital's "incomplete and inconsistently implemented safety protocols" were inadequate to materially reduce patient-on-staff violence under the general duty clause).

[83] 29 U.S.C. § 654(a).

[84] *Id.* § 652(8).

[85] *Compare id.* § 158 *with* § 655.

[86] *Id.* § 655.

[87] *Id.* § 655(a). *See also* Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Occupational Safety & Health Admin., 965 F.2d 962, 968 (11th Cir. 1992) ("Section 6(a) of the Act provided that in its first two years, OSHA should promulgate 'start-up' standards, on an expedited basis and without public hearing or comment, based on 'national consensus' or (continued...)

the Secretary may adopt new occupational safety and health standards, sometimes referred to as "permanent" standards.[88] Permanent standards require OSHA to comply with the rulemaking procedures outlined in Section 6(b), in contrast to rulemaking governed by the Administrative Procedure Act (APA).[89] Third, under Section 6(c), the Secretary may issue ETS when it is necessary to protect employees from grave danger without going through the normal rulemaking process.[90]

As discussed below in the section on enforcement, a person who may be "adversely affected" by a standard may pursue a pre-enforcement challenge within sixty days of the standard being promulgated.[91] Employers may also request a "variance" from an OSHA standard or other requirement to permit an employer to deviate from the requirements of an OSHA standard under specified conditions.[92] Variances may be granted when the employer proposes an alternative means of compliance that provides protection equal to or greater than OSHA's requirements,[93] temporarily due to particular compliance issues,[94] for approved experimental purposes,[95] or in the interest of national defense.[96]

Permanent Standards

Section 6(b) of the OSH Act states, "The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard" pursuant to the law's procedures.[97] The procedural requirements for creating a new standard pursuant to Section 6(b) "incorporate[] the notice and opportunity requirements for general rulemaking" of the APA while also containing requirements specific to OSHA standards.[98] When the Secretary promulgates, modifies, or revokes a standard, OSHA must use the OSH Act's notice and comment rulemaking procedures, compared to the issuance of a less formal regulations or guidance.[99] The notice and comment rulemaking

'established Federal standard[s]' that improve employee safety or health. 29 U.S.C. § 655(a). Pursuant to that authority, OSHA in 1971 promulgated approximately 425 permissible exposure limits ('PELs') for air contaminants, 29 C.F.R. § 1910.1000 (1971), derived principally from federal standards applicable to government contractors under the Walsh–Healey Act.").

[88] 29 U.S.C. § 655(b).

[89] *See* Fla. Peach Growers Ass'n, Inc. v. U.S. Dep't of Lab., 489 F.2d 120, 124 (5th Cir. 1974).

[90] 29 U.S.C. § 655(c).

[91] *Id.* § 655(f).

[92] *See* Frequently Asked Questions Employers and Variance Applicants, OSHA, U.S. DEP'T OF LAB., https://www.osha.gov/variance-program/variance-faq (last visited Nov. 18, 2024).

[93] 29 U.S.C. § 655(d).

[94] *Id.* § 655(b)(6)(A).

[95] *Id.* § 655(b)(6)(C).

[96] *Id.* § 665.

[97] *Id.* § 655(b).

[98] *See* Nat'l Oilseed Processors Ass'n v. Occupational Safety & Health Admin., 769 F.3d 1173, 1178 (D.C. Cir. 2014) (referring to 29 U.S.C. § 655(b)(2) of the OSH Act and 5 U.S.C. § 553(b)(3) of the APA). In addition to general federal rulemaking requirements, OSHA must also abide by the requirements set forth in the Small Business Regulatory Enforcement Fairness Act. *See Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)*, OSHA, U.S. DEP'T OF LAB., https://www.osha.gov/smallbusiness/sbrefa (last visited Oct. 31, 2024) ("When an OSHA proposal is expected to have a significant impact on a substantial number of small entities, the agency must notify the U.S. Small Business Administration's (SBA) Office of Advocacy. The Office of Advocacy then recommends small entity representatives to be consulted on the rule and its effects.... SBREFA provides those small businesses with the opportunity to seek judicial review of the agency's action.").

[99] *See* Agric. Retailers Ass'n v. U.S. Dep't of Lab., 837 F.3d 60, 64 (D.C. Cir. 2016) (requiring that OSHA's narrowed (continued...)

requirements under the OSH Act, generally mirroring the APA, require the Secretary to publish a proposed rule in the *Federal Register* and provide affected parties with an opportunity to comment on or critique the evidentiary basis for the new rule.[100] While the Act sets a timetable for rulemaking (e.g., "[w]ithin sixty days after the expiration of the [comment period or hearing] the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued"[101]), courts have held the timetable for promulgation of standards is not mandatory and the Act provides the Secretary with discretion.[102] Therefore, in practice, rulemaking typically takes longer than set out in the Act.[103]

In issuing new standards, "the Secretary is not restricted by the status quo. He may raise standards which require improvement in existing technology or which require the development of new technology[.]"[104] While the Secretary may pursue a new standard on his or her own initiative, the Act also provides several ways for the Secretary to obtain information related to promulgating a new standard. For example, the OSH Act states that "whenever the Secretary, upon the basis of information submitted to him ... or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee[.]"[105] The Secretary may also subpoena information necessary to the rulemaking processes as authorized by Section 8(b).[106] Although the subpoena power under the Act falls within the statute's authority relating to inspections, investigations, and recordkeeping, discussed below, courts have upheld the Secretary's authority to subpoena information needed in the promulgation of standards where the information requested is relevant and production is not unduly burdensome in violation of the Fourth Amendment.[107]

The Supreme Court has interpreted the standard rulemaking requirements of Section 6(b) to be read in conjunction with the definition of "occupational health and safety standard" in Section 3(8) of the Act.[108] Section 3(8) defines "occupational safety and health standard" to mean "a

interpretation of a standard be promulgated through notice and comment procedures as a standard under the Act because it was aimed at addressing specific significant risk).

[100] 29 U.S.C. § 655(b)(2). *See also* 29 C.F.R. pt. 1911 (1971).

[101] 29 U.S.C. § 655(b)(4).

[102] *See* National Congress of Hispanic American Citizens v. Usery, 554 F.2d 1196, 1200 (D.C. Cir.1977). Section 6(g) of the Act provides "in determining the priority for establishing standards under this Section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, drafts, occupations, businesses, work-places or work environments." 29 U.S.C. § 655(g).

[103] U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-330, WORKPLACE SAFETY AND HEALTH: MULTIPLE CHALLENGES LENGTHEN OSHA'S STANDARD SETTING at Summary (2012) ("Between 1981 and 2010, the time it took the Department of Labor's Occupational Safety and Health Administration (OSHA) to develop and issue safety and health standards ranged widely, from 15 months to 19 years, and averaged more than 7 years."). While OSHA litigation often deals with challenges to promulgating or enforcing OSHA's standards and rules, a reviewing court may also compel agency actions, such as issuing a rule as required by legislation, when it finds that they have been unlawfully withheld or unreasonably delayed. *See* 5 U.S.C. § 706(1). For additional information on congressional means to reduce agency delay in rulemaking, consult CRS Report R45336, Agency Delay: Congressional and Judicial Means to Expedite Agency Rulemaking, by Kevin J. Hickey (2018).

[104] Soc'y of Plastics Indus., Inc. v. Occupational Safety & Health Admin., 509 F.2d 1301, 1309 (2d Cir. 1975).

[105] 29 U.S.C. § 655(b)(1).

[106] 29 U.S.C. § 657(b).

[107] *See* Marshall v. Am. Olean Title Co., Inc., 489 F. Supp. 32, 34 (E.D. Pa. 1980).

[108] *See* Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst. (The Benzene Case), 448 U.S. 607, 639 (1980) (holding in a highly divided plurality decision "that § 3(8) does apply to all permanent standards promulgated under the Act and that it requires the Secretary, before issuing any standard, to determine that it is reasonably necessary and appropriate to remedy a significant risk of material health impairment.").

standard which requires conditions ... *reasonably necessary or appropriate* to provide safe or healthful employment."[109] Accordingly, before the promulgation of any permanent health standard, OSHA must make a threshold finding that it is "reasonably necessary or appropriate" for OSHA to act.[110] The Court also construed the definition to require that OSHA must determine the existence of a "significant risk" to health or safety before issuing any permanent standard.[111]

Whether OSHA has met the requirements of the statute in issuing new standards is also governed by Section 6(f), which states that the determinations of the Secretary shall be conclusive if supported by "substantial evidence."[112] The Supreme Court has stated that substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[113] Courts have held that the substantial evidence test requires a reviewing court to take a "harder look" when reviewing standards by OSHA than when reviewing action under the more deferential arbitrary and capricious standard applicable to agencies governed by the APA and OSHA in other regulatory contexts.[114] In a challenge to OSHA's revision of a standard that added over 400 permissible exposure limits for air contaminants, the Eleventh Circuit held that while OSHA is authorized to undertake "generic" rulemaking addressing multiple substances in a single rule, OSHA failed the substantial evidence test by failing to prove the significant risk to health or safety for each individual limit.[115]

ETS Authority

While OSHA's permanent occupational safety and health standards generally do not become effective until the agency publishes a proposed standard in the *Federal Register*, offers interested parties an opportunity to comment and considers those comments in issuing a final standard, Section 6(c)(1) of the OSH Act authorizes OSHA to promulgate ETS that have immediate effect when specified conditions exist.[116] Since its creation, OSHA has used its ETS authority only eleven times, and two of those times were in response to the COVID-19 pandemic.[117] Before

[109] 29 U.S.C. § 652(8) (emphasis added).

[110] *See Indus. Union Dep't, AFL–CIO*, 448 U.S. at 615. *See also* International Union, UAW v. Occupational Safety & Health Admin., 938 F.2d 1310, 3122 (D.C. Cir. 1991) (considering whether an OSHA standard complied with the significant risk requirement when identical compliance obligations were imposed on employers in various industries where the risks varied greatly).

[111] *See id*. at 639.

[112] 29 U.S.C. § 655(f).

[113] *See* Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 522 (1981) (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951)).

[114] *See* AFL-CIO v. Occupational Safety & Health Admin., 965 F.2d 962, 970 (11th Cir. 1992) (citing Asbestos Info. Ass'n v. Occupational Safety & Health Admin., 727 F.2d 415, 421 (5th Cir. 1984)).

[115] *See id*. at 986–87. Additional statutory requirements, such as whether a standard is "feasible," exist for the promulgation of new standards dealing with toxic materials or harmful physical agents. *See* 29 U.S.C. § 655(b)(5) ("The Secretary ... shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired."). *See also Am. Textile Mfrs. Inst., Inc.*, 452 U.S. at 508.

[116] 29 U.S.C. § 655(c).

[117] *See* CRS Report R46288, *Occupational Safety and Health Administration (OSHA): COVID-19 Emergency*
(continued...)

OSHA can issue an ETS, two core elements must be met: grave danger and necessity. Section 6(c)(1) states:

> The Secretary shall provide, without regard to the requirements of chapter 5 of Title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.[118]

If these elements are not met—for example, if the statement of reasons for promulgating an ETS is found to be insufficient—the ETS may be vacated.[119] Unlike standards promulgated under Section 6(b), an ETS is effective immediately upon publication in the *Federal Register* without any further rulemaking requirements. However, an ETS may remain in effect for only six months, after which a permanent standard must be promulgated pursuant to Section 6(b), with the ETS serving as the proposed rule.[120] The Fifth Circuit has held that an ETS may be amended in the same manner as its initial issuance.[121]

The Supreme Court in *National Federation of Independent Businesses v. OSHA* examined the breadth of OSHA's statutory authority to issue an ETS addressing the COVID-19 pandemic.[122] In 2021, the agency promulgated a workplace vaccination and testing requirement for large employers.[123] The ETS generally required employers with 100 or more employees to establish, implement, and enforce a written mandatory vaccination and testing policy.[124] In its November 5, 2021, *Federal Register* notice, OSHA explained that a COVID-19 vaccination and testing ETS is appropriate because unvaccinated workers face a grave danger from exposure to COVID-19 in the workplace, and vaccination and testing provides the most effective and efficient control available to unvaccinated workers.[125]

Shortly after its publication in the *Federal Register*, the ETS was challenged in multiple federal courts and consolidated before the Sixth Circuit, which dissolved a stay that had been issued

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Temporary Standards (ETS) on Health Care Employment and Vaccinations and Testing for Large Employers, by Scott D. Szymendera at 6 (2022). ("OSHA has used its ETS authority sparingly in its history ... in the 11 times OSHA has issued an ETS, the courts have fully vacated or stayed the ETS in four cases and partially vacated the ETS in one case. In five of the seven ETSs that were not challenged [such as OSHA's first ETS dealing with asbestos in 1971], were fully or partially upheld by the courts, or are still active, OSHA issued a permanent standard either within the six months required by the statute or within several months of the six-month period and always within one year of the promulgation of the ETS. Each of these five cases, however, occurred before 1980, after which a combination of additional federal laws and court decisions added additional procedural requirements to the OSHA rulemaking process. OSHA did not attempt to extend the ETS's expiration date in any of these cases.").

[118] 29 U.S.C. § 655(c)(1).

[119] *See* Dry Color Mfrs. Ass'n, Inc. v. U.S. Dep't of Lab., 486 F.2d 98, 106 (3d Cir. 1973).

[120] 29 U.S.C. § 655(c).

[121] *See* Fla. Peach Growers Ass'n, Inc. v. U. S. Dep't of Lab., 489 F.2d 120 (5th Cir. 1974).

[122] 595 U.S. 109 (2022). *See also* CRS Legal Sidebar LSB10689, *Supreme Court Stays OSHA Vaccination and Testing Standard*, by Jon O. Shimabukuro (2022).

[123] COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021).

[124] *Id.* at 61402. The ETS policy required employees to be fully vaccinated, except those employees for whom a vaccine is medically contraindicated, those for whom medical necessity requires a delay in vaccination, and those who are legally entitled to a reasonable accommodation under federal civil rights laws because they have disabilities or sincerely held religious beliefs that conflict with the vaccination requirement. An employer may be exempt from maintaining the policy if it establishes, implements, and enforces a written policy that allows an employee to either be fully vaccinated against COVID-19 or provide proof of regular testing for COVID-19 and wear a face covering when indoors or occupying a vehicle with another person for work purposes. *See id* at 61447.

[125] *Id.* at 61407.

against OSHA.[126] The Supreme Court, however, reversed the Sixth Circuit decision, holding that OSHA likely exceeded its authority in issuing the ETS, and stayed the enforcement of the ETS.[127] In its per curiam decision, the Court concluded that staying the implementation of the ETS was justified because the applicants—the National Federation of Independent Business and a coalition of states—were likely to succeed on the merits of their claim that OSHA lacks the statutory authority to issue such a standard. In so doing, the Court distinguished the agency's authority to establish only workplace safety standards and not "broad public health measures."[128] According to the Court, if OSHA were allowed to regulate COVID-19, which is transmissible "at home, in schools, during sporting events, and everywhere else that people gather," it is not an occupational hazard.[129] However, the Court clarified that OSHA could regulate occupation-specific risks of COVID-19 (e.g., regulations for researchers who work with the virus, or occupations working in crowded or cramped environments) and clarified that "[w]here the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible."[130]

Recordkeeping and Reporting Requirements

Section 2(b)(12) lists as a purpose of the OSH Act "providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem."[131] To accomplish this purpose, the Act in Section 8(c) requires that each employer make, preserve, and make available to the Secretary such records regarding his activities relating to the Act "as the Secretary ... may prescribe."[132] Furthermore, employers are generally required to report workplace fatalities and serious injuries to OSHA.[133] Employers are also subject to various posting requirements, such as posting an annual summary of workplace incidents in a conspicuous location in the workplace.[134]

Employers covered under the OSH Act are subject to its recordkeeping and reporting requirements unless specifically exempted by regulation or statute. Included among the partial exemptions are small business employers with no more than ten employees[135] and employers with businesses engaged in a wide range of activities such as clothing retail, health care, and real

[126] *In re* MCP NO. 165, 21 F.4th 357 (6th Cir. 2021).

[127] *See* Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 595 U.S. 109, 113 (2022).

[128] *See id.* at 117.

[129] *Id.* In a dissenting opinion, Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan maintained that, pursuant to the requirements of Section 6(c)(1), the COVID-19 virus is a new hazard that poses a grave danger to employees. The dissent also criticized the Court's opinion for limiting OSHA's regulatory authority when the OSH Act permits regulating hazards that may exist both in and out of the workplace: "The statute does not require that employees are exposed to those dangers only while on the workplace clock. And that should settle the matter." *See id*. at 132 (Breyer, J., dissenting).

[130] *Id.* at 118. The Ninth Circuit cited the Court in its decision that a Washington State proclamation requiring COVID precautions in daily life faced by Americans generally was not preempted by the OSH Act. *See* Flower World v. Sacks, 43 F.4th 1224 (9th Cir. 2022).

[131] 29 U.S.C. § 651(b)(12).

[132] *Id.* § 657(c).

[133] *See* 29 C.F.R. § 1904.39 (2014).

[134] *Id.* § 1904.32(b)(5). For additional examples, *See Workplace Posters*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topics/posters (last visited Nov. 20, 2024).

[135] 29 C.F.R. § 1904.1 (2001) (partially exempting such businesses from recordkeeping requirement except to report fatalities or hospitalization accidents as required by 29 C.F.R. § 1904.39).

estate[136] However, even an exempt employer may be required to keep a record of serious workplace incidents.[137]

Pursuant to the OSH Act, OSHA has promulgated regulations requiring the recording and reporting of fatalities, injuries, and illnesses that are "work-related."[138] An incident is considered to be "work-related" if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a preexisting injury or illness.[139] In determining whether an injury or illness is work-related to cite an employer for failure to record an incident, courts have held that OSHA must take into account the context of the employee's work and workplace.[140] While work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the workplace, there are several exceptions.[141] For example, if the employee was present in the work environment as a member of the general public rather than as an employee at the time of the injury, recording is not required.[142] Recording is also not required if the injury or illness is solely the result of an employee doing personal tasks (unrelated to his or her employment) at the establishment outside of the employee's assigned working hours.[143] An injury or illness that occurs while an employee is working at home, including work in a home office, is considered work-related if the injury or illness occurs while the employee is performing work and the injury or illness is directly related to the performance of work rather than to the general home environment or setting.[144]

Enforcement

The Act authorizes OSHA to inspect, investigate, and (if necessary) cite employers for violations of OSHA standards and regulations.[145] To accomplish this purpose, enforcement processes are authorized or delegated to several offices. The final authority to adjudicate disputes arising from OSHA enforcement belongs to the independent Commission.[146] Compliance safety and health

[136] *Id.* § 1904.2(a)(1).

[137] *See id.* § 1904.1(a)(1) ("However, as required by § 1904.39, all employers covered by the OSH Act must report to OSHA any work-related incident that results in a fatality, the in-patient hospitalization of one or more employees, an employee amputation, or an employee loss of an eye.").

[138] 29 C.F.R. § 1904.0.

[139] *Id.* § 1904.5(a).

[140] *See* Caterpillar Logistics Services, Inc. v. Solis, 674 F.3d 705, 709 (7th Cir. 2012) (finding that an ALJ failed to take into account a company's "300-person-years of experience with its packing department" in determining whether illness was work-related).

[141] 29 C.F.R. § 1904.5(b)(2).

[142] *Id.*

[143] *Id. But see* Letter from Amanda L. Edens, Dir. of Technical Support and Emergency Management, to Alan Parker, CSP (July 29, 2019), https://www.osha.gov/laws-regs/standardinterpretations/2019-07-29 (providing that an employee injured on his lunch break in his work environment was not a member of the "general public" nor outside of his "working hours" and therefore did not meet either recording exception).

[144] 29 C.F.R. § 1904.5(b)(7) ("For example, if an employee drops a box of work documents and injures his or her foot, the case is considered work-related. If an employee's fingernail is punctured by a needle from a sewing machine used to perform garment work at home, becomes infected and requires medical treatment, the injury is considered work-related. If an employee is injured because he or she trips on the family dog while rushing to answer a work phone call, the case is not considered work-related. If an employee working at home is electrocuted because of faulty home wiring, the injury is not considered work-related.").

[145] In addition to standards promulgated under Section 6 and record requirements, the Act authorizes the Secretary to promulgate regulations "necessary or appropriate for the enforcement of [the Act] or for developing information regarding the causes and prevention of occupational accidents and illnesses," in 29 U.S.C. § 657(c)(1).

[146] *Id.* § 651(b)(3).

officers (known as compliance officers) within OSHA conduct inspections of workplaces. The Department of Justice U.S. Attorney's Offices in the appropriate jurisdictions prosecute criminal cases under the Act, and the Justice Department also represents OSHA in civil cases in federal court.[147]

OSHA dispute procedures provide for two levels of adjudication—a trial level before an administrative law judge (ALJ) and an appellate level before a three-member Commission panel.[148] The Secretary, represented by a government attorney in the proceedings, bears the burden of proving the contested violations in a citation.[149] After a hearing, the ALJ will issue a decision that will either affirm, modify, or vacate a citation. The ALJ's decision becomes a final order in thirty days unless an aggrieved or adversely affected party petitions for review, in which case the Commission may review the evidence and issue its own decision.[150]

After a proceeding and final order by the Commission panel or after an ALJ's decision becomes final, an aggrieved party may seek review of an adverse final decision in the appropriate U.S. court of appeals. Section 11 provides that "any person adversely affected or aggrieved by a final order of the Commission ... may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit[.]"[151] A reviewing court treats the findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record as a whole, as conclusive.[152]

Inspection and Investigation

OSHA has the authority to inspect and investigate a workplace for a violation of a standard or regulation.[153] Section 8 of the OSH Act sets the general requirements for inspection and investigation, which generally include observations, interviews, and review of relevant materials regarding the workplace.[154] The OSH Act states that the Secretary, upon presenting appropriate credentials to the business owner or agent in charge, is authorized "(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable

[147] U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL § 2011. OSHA—Criminal Violations, https://www.justice.gov/archives/jm/criminal-resource-manual-2011-osha-criminal-violations (last visited Nov. 5, 2024).

[148] *See* OCCUPATIONAL SAFETY & HEALTH REV. COMM'N, HOW OSHRC WORKS (2022), https://www.oshrc.gov/about/how-oshrc-works/ (last visited Nov. 5, 2024).

[149] *See, e.g.*, Sec'y of Labor v. Astra Pharm. Prod., Inc., 9 BNA OSHC 2126 (No. 78-6247 1981). ("In order to prove a violation ... the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence.")

[150] *See* 29 C.F.R. § 2200.91 (2019). *See also* OCCUPATIONAL SAFETY & HEALTH REV. COMM'N, GUIDE TO SIMPLIFIED PROCEEDINGS (Oct. 2020), https://www.oshrc.gov/guides/guide-to-simplified-proceedings/ (last visited Nov. 20, 2024).

[151] 29 U.S.C. § 660(a).

[152] *Id.*

[153] 29 U.S.C. § 657(a). The Secretary may enter, inspect, and investigate workplaces as necessary to "carry out the purposes of [the Act]." *Id.*

[154] *Id.* § 657.

limits and in a reasonable manner."[155] Employees or representatives of employees may also request inspections.[156]

If an employer refuses to cooperate with an inspection or investigation, OSHA may seek an administrative warrant from a federal court. In *Marshall v. Barlow's, Inc.*, the Supreme Court held that a nonconsensual OSHA Section 8(a) search of a workplace without a warrant or absent an exception violated the Fourth Amendment.[157] In the decision, the Court distinguished previously upheld warrantless workplace searches in the liquor and firearms industries based on a long tradition of close government supervision and inspection in those industries.[158] The Court also expressed that OSHA inspectors had "unbridled discretion" in choosing which businesses to inspect and when to do so, leaving businesses at the mercy of possibly arbitrary actions and without assurances as to limitations on scope and standards of inspections.[159] Furthermore, the Court rejected the argument that warrantless inspections are essential to proper OSHA enforcement, as the Court expected most businesses to consent to inspections and that OSHA could resort to an administrative warrant in order to inspect sites where a business refused consent.[160] Therefore, to conduct a nonconsensual inspection, OSHA is required to establish probable cause for an administrative search.[161]

The OSH Act states that a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the OSHA inspector during the physical inspection of any workplace.[162] Whether a union representative who is not an employee of the employer can serve as the representative of employees during an inspection has varied,[163] and OSHA announced a notice of proposed rulemaking in 2023 to revisit implementing the rule allowing third-party employee representative presence.[164] The final rule, sometimes known as the Walkaround Rule, went into effect on May 31, 2024.[165]

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[155] *Id.* § 657(a).

[156] *Id.* § 657(f) ("Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger.... If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists.").

[157] 436 U.S. 307 (1978).

[158] *Id.* at 313.

[159] *Id.* at 323.

[160] *Id.* at 316–17. While the Court later clarified in the context of Department of Labor mine safety inspectors under the Mine Safety and Health Act that the Fourth Amendment permitted some administrative inspections of commercial property without a warrant in *Donovan v. Dewey*, the decision distinguished the inspection scheme at issue in Donovan from the "broad discretion" given to OSHA inspectors. *See* Donovan v. Dewey, 452 U.S. 594, 604 n.9 (1981).

[161] *See* Martin v. Int'l Matex Tank Terminals-Bayonne, 928 F.2d 614, 621–22 (3d Cir. 1991) (citing *Barlow's*, 436 U.S. at 320) (Secretary may establish probable cause for administrative warrant based on "specific evidence of an existing violation" or "reasonable legislative or administrative standards" for conducting an inspection).

[162] 29 C.F.R. § 1903.8(a) (1971).

[163] For example, in 2017 a district court held that an OSHA standard interpretation letter allowing for third-party representatives during walkarounds contradicted Section 1903.8(c), which then stated only that employees of the employer are authorized as representatives. *See* Nat'l Fed'n of Indep. Bus. v. Dougherty, No. 3:16-CV-2568-D, 2017 WL 1194666, at *11 (N.D. Tex. Feb. 3, 2017).

[164] Worker Walkaround Representative Designation Process, 88 Fed. Reg. 59825 (proposed Aug. 23, 2023).

[165] Worker Walkaround Representative Designation Process, 89 Fed. Reg. 22558 (April 1, 2024) (to be promulgated at 29 C.F.R. pt. 1903).

Citation and Abatement

Sections 9 and 10 of the OSH Act set the requirements for the citation process and the procedures for enforcement, respectively.[166] If OSHA finds that an employer has violated a standard or certain statutory or regulatory requirements, it may issue a citation to the employer. Section 9 requires that each citation must be issued with "reasonable promptness" and "describe with particularity the nature of the violation, including reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated."[167]

Section 10 states that the employer may contest the citation within fifteen working days of receiving notice.[168] If an employer is cited for violating an OSHA standard and the citation is contested, the Secretary must generally show by a preponderance of the evidence that (1) the cited standard applies, (2) the employer failed to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.[169] If, after fifteen days, the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, the citation and the penalty assessment is deemed a final order of the Commission and is generally unreviewable.[170]

Citations also require that an employer correct or "abate" the violation. OSHA has defined "abatement" as "action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by OSHA during an inspection."[171] Section 9(a) of the Act requires that a citation "fix a reasonable time for abatement of the violation" as decided by the Commission.[172] The Commission sets an abatement date that is as early as possible in order to address the violation while giving the employer a reasonable opportunity to address the violation.[173] Whether an employer has successfully abated a violation is largely a fact-dependent inquiry, and employers may raise defenses including that the original condition was nonviolative of the OSH Act, that the citation lacked specificity or was incorrect, or that there has actually

[166] 29 U.S.C. § 658; *id.* § 659.

[167] *Id.* § 658(a). *See also* Nat'l Realty & Constr. Co. v. Occupational Safety & Health Rev. Comm'n, 489 F.2d 1257, 1264 (D.C. Cir. 1973) (describing the requirements of fair notice as "liberally construed and easily amended" and finding that even where a citation may contain some discrepancies, "any ambiguities surrounding the Secretary's allegations could have been cured at the hearing itself. So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue.").

[168] 29 U.S.C. § 659(a). ("If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.... ").

[169] *See* ROTHSTEIN, *supra* note 1, at § 5:12. Burden of proof—generally (citing Sec'y of Labor v. Astra Pharmaceutical Products, Inc., 9 BNA OSHC 2126 at *4 (No. 78-6247 1981), *aff'd in part*,68 F.2d 69 (1st Cir. 1982)); *but see* Compass Environmental, Inc. v. Occupational Safety & Health Rev. Comm'n, 663 F.3d 1164 (10th Cir. 2011) (holding that the Commission was not required to strictly follow the four-part test and could apply a more "training-specific test" in order to evaluate the relevant factors in the instant case).

[170] 29 U.S.C. § 659(a). *See also* Brennan v. Winters Battery Mfg. Co., 531 F.2d 317, 322 (6th Cir. 1975).

[171] 29 C.F.R. § 1903.19(b)(1) (1997).

[172] 29 U.S.C. § 658(a).

[173] Matthews and Fritts, Inc., 2 BNA OSHC 1149 (No. 3998, 1974) ("Reasonable ... requires giving the employer the opportunity to evaluate the violation, formulate plans for correction, and have time to implement the corrective plans.").

been proper abatement by the employer.[174] However, as discussed below, some of the OSH Act's most severe penalties are authorized for failure to abate a violation.[175]

Penalties

Section 19 of the OSH Act provides for a wide range of penalties based on factors such as the knowledge and intent of the employer, the seriousness of the violation, and the employer's compliance history, which may impact the ultimate amount of the penalty.[176] Penalties may be civil or, in the case of willful violations resulting in the death of an employee, criminal.[177] The Secretary may issue citations and penalties to employers for violations of standards, recordkeeping or posting requirements, or other regulations.[178] Additionally, the Act provides criminal penalties for anyone who "knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to [the Act]."[179]

While the OSH Act statutory language provides for a range of civil penalty amounts, Congress has since required federal agencies, including OSHA, to adjust the level of civil monetary penalties upward and make subsequent annual adjustments for inflation no later than January 15 of each year.[180]

The penalty annual adjustments for 2024 are as follows:

- Serious: $1,190 – $16,131 per violation
- Other than serious: $0 – $16,131 per violation
- Willful or repeated: $11, 524 – $161,323 per violation[181]
- Posting requirements: $0 – $16,131 per violation
- Failure to abate: $0 – $16,131 per day

[174] *See* ROTHSTEIN, *supra* note 58, at § 2723. Failure to abate (citing York Metal Finishing Co., 1 BNA OSHC 1655 (No. 245, 1974); Sec'y of Labor v. Kit Manufacturing Co., 2 BNA OSHC 1672 (No. 603, 1975); Alden Leeds, Inc. v. Occupational Safety & Health Rev. Comm'n, 298 F.3d 256 (D.C. Cir. 2002)).

[175] *See* 29 U.S.C. 666(d) ("Any employer who fails to correct a violation ... may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.").

[176] *Id.* § 666.

[177] *Id.* § 666(e).

[178] *Id. See also* OCCUPATIONAL SAFETY & HEALTH ADMIN., FIELD OPERATIONS MANUAL, ch. 6: Penalties and Debt Collection, https://www.osha.gov/enforcement/directives/cpl-02-00-163/chapter-6 (last visited Nov. 15, 2024).

[179] *Id.* § 666(g).

[180] *See* Memorandum from Kimberly Stille, Dir., Directorate of Enforcement Programs, Dep't of Labor, on 2024 Annual Adjustments to OSHA Civil Penalties (Jan 8, 2024), https://www.osha.gov/memos/2024-01-08/2024-annual-adjustments-osha-civil-penalties ("On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 was enacted, which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 as previously amended by the 1996 Debt Collection Improvement Act (collectively, the 'Prior Inflation Adjustment Act'), to improve the effectiveness of civil monetary penalties and maintain their deterrent effect. The Inflation Adjustment Act required agencies to: (1) adjust the level of civil monetary penalties with an initial 'catch-up' adjustment through an interim final rule and (2) make subsequent annual adjustments for inflation, no later than January 15 of each year.").

[181] Courts have considered what constitutes a "repeated" violation, as the term is undefined in the Act, but such a violation may constitute a maximum penalty. *See, e.g.*, Bunge Corp. v. Sec'y of Lab., 638 F.2d 831, 836, 38 (Secretary must show "the substantial similarity of the conditions associated with the past and present violations of the same standard.").

The Secretary may propose penalties for any of the above violations, but the Commission maintains the final authority to assess civil penalties provided under the Act, "giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations."[182]

The OSH Act also provides for criminal penalties for willful violations resulting in the death of an employee. Section 17(e) states that "any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of th[e] Act, or of any regulations prescribed pursuant to th[e] Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both[.]"[183] The Criminal Fine Enforcement Act increased the maximum criminal fines available for federal criminal offenses for individuals[184] and organizations.[185]

State Plans

OSHA's occupational health and safety standards generally preempt state occupational health and safety laws.[186] However, the Act does not prevent any state from "asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect[.]"[187]

States and U.S. territories may also adopt their own workplace safety and health programs in compliance with federal standards and subject to OSHA approval, known as "state plans."[188] OSH Act Section 18 authorizes any state that "desires to assume responsibility for [the] development and enforcement ... of occupational safety and health standards relating to" federal OSHA

[182] 29 U.S.C. § 666(j); *id.* § 659(c).

[183] *Id.* § 666(e).

[184] 18 U.S.C. § 3571(b) ("Except as provided in subsection (e) of this section, an individual who has been found guilty of an offense may be fined not more than the greatest of (1) the amount specified in the law setting forth the offense; (2) the applicable amount under subsection (d) of this section; (3) for a felony, not more than $250,000; (4) for a misdemeanor resulting in death, not more than $250,000; (5) for a Class A misdemeanor that does not result in death, not more than $100,000; (6) for a Class B or C misdemeanor that does not result in death, not more than $5,000; or (7) for an infraction, not more than $5,000.").

[185] *Id.* § 3571(c) ("Except as provided in subsection (e) of this section, an organization that has been found guilty of an offense may be fined not more than the greatest of (1) the amount specified in the law setting forth the offense; (2) the applicable amount under subsection (d) of this section; (3) for a felony, not more than $500,000; (4) for a misdemeanor resulting in death, not more than $500,000; (5) for a Class A misdemeanor that does not result in death, not more than $200,000; (6) for a Class B or C misdemeanor that does not result in death, not more than $10,000; and (7) for an infraction, not more than $10,000.").

[186] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 102 (1992) (holding that the Act "precludes any state regulation of an occupational safety and health issue with respect to which a federal standard has been established, unless a state plan has been submitted and approved pursuant to § 18(b)"). Comparatively, regarding state tort law, OSHA has recognized that the OSH Act does not contain "any language indicating that Congress meant the statutes or regulations promulgated under them to preempt state tort actions. To the contrary, Section 4(b)(4) of the OSH Act, 29 U.S.C. [§] 653(b)(4), provides '[n]othing in this Act shall ... enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death arising out of, or in the course of, employment.' This provision is the Act's sole reference to state tort law, and it is, significantly, a savings clause." Letter from Deborah Greenfield, Acting Deputy Solicitor, Occupational Safety & Health Admin., to Am. Assoc. for Just. (Feb. 3, 2010), https://www.osha.gov/laws-regs/standardinterpretations/2010-02-03-0.

[187] 29 U.S.C. § 667(a).

[188] For additional information on state plans, see CRS Report R43969, *OSHA State Plans: In Brief, with Examples from California and Arizona*, by Scott D. Szymendera (2017).

standards to submit a plan to the Secretary.[189] State plans must establish standards that are "at least as effective" as federal OSHA standards.[190] Similarly, states that operate their own plans are required to adopt penalty levels that are at least as effective as those established by OSHA.[191] However, state plans may impose higher fines and stricter penalties and have their own systems for review and appeal of citations, penalties, and abatement periods.[192] Thus, the federal standards operate as a floor in terms of the effectiveness of safety and health standards in state plans. If a state does not submit a state plan to OSHA, it is precluded from enforcing state laws relating to hazards covered by the Act.[193]

Unlike the OSH Act, which excludes a state or any political subdivision of a state from its definition of "employer," a state plan may extend workplace safety protections to state and local government employees.[194] There are currently twenty-two state and territory plans covering private sector and state and local government workers.[195] Six other states and the U.S. Virgin Islands have adopted plans covering only state and local workers.[196] In these jurisdictions, private sector employers remain under the federal jurisdiction of OSHA.

Approval and Withdrawal of State Plans

After a state submits a plan application to OSHA, the plan must go through several stages—including initial approval, a developmental stage, certification, and an operational stage—before final approval.[197] As mentioned above, state occupational safety and health standards must be "at least as effective" as their federal counterparts. Section 18(c) lists eight requirements state plans must meet to obtain approval from the Secretary.[198] Among these requirements are designation of a state agency or agencies as responsible for administering the plan throughout the state, satisfactory assurances that such state will provide adequate funds and authority to the administration and enforcement of such standards, satisfactory assurances that such state will establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the state and its political subdivisions, and reporting requirements.[199]

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[189] 29 U.S.C. § 667(b).

[190] *See* Am. Fed'n of Lab. & Cong. of Indus. Orgs., Indus. Union Dep't, AFL–CIO v. Marshall, 570 F.2d 1030 (D.C. Cir. 1978).

[191] 29 U.S.C. § 667(c)(2).

[192] *See State Plan Frequently Asked Questions*, OSHA, U.S. DEP'T OF LAB., https://www.osha.gov/stateplans/faqs (last visited Nov. 15, 2024).

[193] *See* Cong. Rsch. Serv., *Overview of Supremacy Clause*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artVI-C2-1/ALDE_00013395/ (last visited Nov. 15, 2024).

[194] "The term 'employer' means a person engaged in a business affecting commerce who has employees, but does not include ... any State or political subdivision of a State." 29 U.S.C. § 652(5). *See also* CRS In Focus IF11619, *OSHA Jurisdiction Over Public Schools and Other State and Local Government Entities: COVID-19 Issues*, by Scott D. Szymendera (2021).

[195] Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. General information regarding currents state plans is available at *State Plans*, OSHA, U.S. DEP'T OF LAB., https://www.osha.gov/stateplans/ (last visited Nov. 8, 2024).

[196] *Id.* (Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, and the U.S. Virgin Islands).

[197] *See* ROTHSTEIN, *supra* note 1, at § 3:4. Approval process—Application, n.1.

[198] 29 U.S.C. § 667(c).

[199] *Id.*

As part of the complex process for approving a state plan, the Secretary and the state agency must publish the plan and other information for public notice and comment in the *Federal Register* and within the state.[200] The Secretary must afford the state due notice and opportunity for a hearing before rejecting a plan submitted under Section 18(b).[201] Final decisions of rejection or approval of a state plan must also be published in the *Federal Register*.[202] Even after final approval of a plan, the Secretary is required to continually evaluate the manner in which a state is carrying out its approved plan and may still withdraw approval of a certified plan if a state fails to comply substantially.[203] A state may obtain review of the Secretary's decision rejecting or withdrawing approval of a state plan by filing a petition with the U.S. court of appeals for the circuit in which the state is located within thirty days.[204] A court must affirm the Secretary's decision to reject a proposed state plan or withdraw the approval of a plan unless the decision is not supported by substantial evidence.[205]

State operating grants are available to states whose plans have been certified as operational.[206] Section 23(g) authorizes the Secretary to make grants, equal to no more than 50% of the cost of administering the state plan, to the states to assist them in administering and enforcing programs for occupational safety and health contained in state plans approved by the Secretary pursuant to Section 18.[207]

Considerations for Congress

Congress may respond to judicial or administrative interpretations of previously enacted statutes in several ways, including by passing clarifying legislation, curtailing or growing executive or judicial authority within constitutional limits, or allowing agency interpretations or caselaw to develop without congressional intervention.[208] Recently, there have been significant changes in interpretations of agency authority by the judiciary that could affect the manner in which OSHA enforces the OSH Act. Accordingly, Congress may consider whether these changes merit intervention by the legislative branch or not.

As previously discussed, in *National Federation of Independent Business v. OSHA*, the Supreme Court concluded that the OSH Act does not authorize OSHA to impose a mandatory vaccination and testing policy for employers with 100 or more employees.[209] In its per curiam decision, the Court determined that OSHA exceeded its authority because the Act empowers the Secretary to set workplace safety standards, not broad public health measures.[210] If Congress determines that

[200] *See* 29 C.F.R. § 1902, Subpart C (1971).

[201] 29 U.S.C. § 667(d).

[202] *See* 29 C.F.R. § 1902.23.

[203] *Id.* at § 667(f). For example, on April 21, 2022, OSHA issued a proposed rule to revoke Arizona's occupational safety and health plan's final approval under Section 18(e). However, OSHA withdrew the proposed rule on February 15, 2023, in light of compliance actions by Arizona. *See* Arizona State Plan for Occupational Safety and Health; Proposed Reconsideration and Revocation; Withdrawal, 88 Fed. Reg. 9796 (proposed Feb. 15, 2023).

[204] 29 U.S.C. § 667(g).

[205] *Id.*

[206] *Id.* § 672(g).

[207] *Id.* The OSH Act also provided for grants to develop state plans. However, pursuant to 29 U.S.C. § 672(a), June 30, 1973, was the cutoff date for execution of developmental grant agreements.

[208] *See* CRS Report R44729, *Constitutional Authority Statements and the Powers of Congress: An Overview*, by Whitney K. Novak (2023).

[209] 595 U.S. 109 (2022).

[210] *See id*.

the Court's interpretation does not appropriately reflect congressional intent, it could amend the grants of authority in the OSH Act provisions regarding permanent standards in Section 6(b) and ETS in Section 6(c).

In 2024, the Supreme Court issued a decision in *Loper Bright Enterprises v. Raimondo* and *Relentless Inc. v. Department of Commerce* (collectively *Loper*) overruling the *Chevron* doctrine.[211] The *Chevron* doctrine—named for the case that articulated it—required federal courts to defer to a federal agency's reasonable interpretation of ambiguous statutory provisions the agency administers.[212] The Court in *Loper* held that the *Chevron* framework violates Section 706 of the APA, which requires courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[213] The majority held that the APA's command required courts, rather than agencies, to exercise their own independent judgment on the meaning of a federal statute and "say what the law is."[214]

The Court's decision in *Loper* was based on its interpretation of the APA, and so the Court did not address OSHA's rulemaking scheme applicable to the establishment of standards in Section 6 of the OSH Act. As previously discussed in the section regarding OSHA standards, certain requirements in the OSH Act largely mirror the APA, but the Act also has distinct requirements, such as the judicial review requirement in Section 6(f), which states that "the determinations of the Secretary in issuing standards shall be conclusive if supported by substantial evidence in the record considered as a whole."[215] Accordingly, the Court's decision in *Loper* is unlikely to affect a court's review of the factual findings and decisionmaking of OSHA in setting standards; however, to the extent that standards or the application of the standards in agency actions rely on OSHA's interpretations of the Act and received or could have previously received *Chevron* deference, such deference may not apply if a court applies the reasoning of *Loper* to other statutes.[216] Additionally, *Loper* would apply to many of OSHA's other regulations that do not contain

[211] 144 S. Ct. 2244 (2024). The Court announced the *Chevron* doctrine in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984).

[212] *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enter. v. Raimondo, 144 S. Ct. 244 (2024).

[213] 5 U.S.C. § 706.

[214] *See Loper Bright Enter.*, 144 S.Ct. at 2257 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). Although the petitioners also challenged *Chevron* on constitutional grounds, the majority opinion did not address those arguments. *See* CRS Legal Sidebar LSB11189, *Supreme Court Overrules Chevron Framework*, by Benjamin M. Barczewski (2024). The Court also did not address the continuing viability of other forms of judicial deference to agencies, such as deference applied to an agency's reasonable interpretation of its own regulations. *See* CRS Legal Sidebar LSB10558, *Judicial Review Under the Administrative Procedure Act (APA)*, by Jonathan M. Gaffney (2024).

Days after the Court issued its decision in *Loper Bright*, the Court issued its decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 144 S.Ct. 2440, which extends the period in which plaintiffs can bring certain challenges to agency regulations under the APA, thus broadening the opportunity for challenges to long-established OSHA interpretations. For additional information on *Corner Post*, see CRS Legal Sidebar LSB11197, *Corner Post and the Statute of Limitations for Administrative Procedure Act Claims*, by Benjamin M. Barczewski and Jonathan M. Gaffney (2024).

[215] *See* Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Occupational Safety & Health Admin., 965 F.2d 962, 970 (11th Cir. 1992) (quoting Asbestos Info. Ass'n v. Occupational Safety & Health Admin., 727 F.2d 415, 421 (5th Cir. 1984)) ("Under this test, 'we must take a "harder look" at OSHA's action than we would if we were reviewing the action under the more deferential arbitrary and capricious standard applicable to agencies governed by the Administrative Procedure Act.'").

[216] *See, e.g.*, Kiewit Power Constructors Co. v. Sec'y of Lab., U.S. Dep't of Lab., 959 F.3d 381 (D.C. Cir. 2020) (applying *Chevron* deference to the Secretary's extension of an existing standard to another industry).

specific standards of judicial review and may be generally challenged under the APA.[217] In light of *Loper*, OSHA's interpretations of ambiguous statutory terms in the OSH Act going forward would likely not be afforded agency deference in federal courts. For example, Congress may consider whether a court considering OSHA's previously discussed 2024 Walkaround Rule is less likely to defer to the agency's interpretation of terms in Section 8(e) of the OSH Act.[218] Congress may choose to amend the OSH Act to further define terms or address other provisions with more specificity.

The *Loper* decision further clarified that Congress may still confer interpretive authority on agencies.[219] For example, the Court cited examples where Congress has explicitly delegated to an agency the authority to give meaning to a particular statutory term.[220] The Court also identified federal laws containing statutory terms that give agencies regulatory flexibility through such terms as "appropriate" and "reasonable."[221] Therefore, if Congress determines that courts are intruding on decisionmaking authority reserved for OSHA, Congress may choose to amend the OSH Act with statutory language modeled after the Court's examples in *Loper*.

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[217] *See* Agric. Retailers Ass'n v. United States Dep't of Lab., 837 F.3d 60, 63–64 (D.C. Cir. 2016) ("The Act also authorizes the promulgation of 'regulation[s]' (and other rules falling short of 'standards'), which are governed by a different means of judicial review: challenges to regulations are brought under the Administrative Procedure Act").

[218] 29 U.S.C. § 657(e) ("Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace[.]"). *See also* Worker Walkaround Representative Designation Process, 89 Fed. Reg. 22558 (Apr. 1, 2024) (to be codified at 29 C.F.R. pt. 1903).

In the context of other federal labor and employment laws, lower courts have shown varying approaches to applying the *Loper* decision. *See* Mayfield v. U.S. Dep't of Labor, 117 F.4th 611, 617 (5th Cir. 2024) ("[B]ecause there is an uncontroverted, explicit delegation of authority [in 29 U.S.C. § 213(a)(1) of the Fair Labor Standards Act], the question is whether the Rule is within the outer boundaries of that delegation."). *But see* Rieth-Riley Constr. Co. v. Nat'l Lab. Rels. Bd., 114 F.4th 519, 528 (6th Cir. 2024) ("We do not defer to the NLRB's interpretation of the NLRA, but exercise independent judgment in deciding whether an agency acted within its statutory authority.").

[219] *See Loper Bright Enter.*, 144 S. Ct. at 2268 ("That is not to say that Congress cannot or does not confer discretionary authority on agencies. Congress may do so, subject to constitutional limits, and it often has.").

[220] *See id.* at 2263 n.5 (for example, citing 29 U.S.C. § 213(a)(15) exempting from provisions of the Fair Labor Standards Act "any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary").

[221] *See id*. at 2263.

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